JD(ATL)–27–14
Charlotte, NC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 71

and **CASE 10–CB–114563**

JOHN STEPHENS, an Individual

PACIFIC 2.1 ENTERTAINMENT GROUP, INC.

and **CASE 10–CA–120024**

JOHN STEPHENS, an Individual

Jasper C. Brown, Jr., Esq., for the General Counsel.
James F. Wallington, Esq. (Baptiste & Wilder, P.C.), *of Washington, D.C*, for the Respondent Union.
Michael J. Campolo, Esq., of Los Angeles, California, for the Respondent.
Mr. John Stephens, for the Charging Party.

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge. The Respondent Union, which operated an exclusive hiring hall pursuant to an agreement with the Respondent Employer, announced and implemented a referral policy giving preference to union members over nonmembers. The Union thereby violated Section 8(b)(1)(A) and (2) of the Act. Because the Respondent Employer did not know and reasonably cannot be charged with knowledge of the discriminatory referral practice, it did not violate Section 8(a)(1) and (3) of the Act, as alleged, and is not jointly and severally liable to remedy the violations.

Procedural History

This case began October 17, 2013, when the Charging Party filed the original charge against Respondent Union in Case 10–CB–114563. The Charging Party amended this charge on November 12, 2013, December 20, 2013, and on January 6, 2014. Also on January 6, 2014, the Charging Party filed a charge against Respondent Employer in Case 10–CA–120024.

On January 31, 2014, the Regional Director for Region 10 of the Board issued a complaint against Respondent Union in Case 10–CB–114563. On February 18, 2014, the Region withdrew and reissued this complaint to correct a problem with service.

On March 26, 2014, the Regional Director issued an "Order Consolidating Cases, Amended Consolidated Complaint, Notice of Hearing and Compliance Specification" which consolidated Case 10–CB–114563 with Case 10–CA–120024. On April 4, 2014, the Region Director amended the complaint and compliance specification.

On April 15, 2014, the Regional Director issued a "Second Amended Consolidated Complaint, Notice of Hearing and Second Amended Compliance Specification." For brevity, I will refer to this pleading simply as the "Complaint." Both Respondents filed timely answers.

On May 14, 2014, a hearing opened before me in Charlotte, North Carolina. It continued on May 15 and closed on May 16, 2014. Thereafter, the parties filed timely briefs, which I have considered.

Admitted Allegations

Based on the admissions in Respondents' answers, I conclude that the government has proven the allegations discussed in this "Admitted Allegations" section of the Decision.

Both Respondents have admitted that the charge in Case 10–CA–120024 was filed and served on Respondent Employer on January 6, 2014. I so find.

Respondent Union has admitted that the Charging Party filed and served the original charge in Case 10–CB–114563 on October 17, 2014, and thereafter amended it three times, as alleged in the Complaint and described above. Respondent Employer has answered that it lacks knowledge, which has the effect of a denial. However, neither Respondent Employer nor any other party claims that the charge and amended charges were not filed and served as alleged, and no evidence would support such an assertion. In sum, nothing rebuts the presumption of administrative regularity. Accordingly, and in view of the Respondent Union's admission that it received the original charge and amended charges in Case 10–CB–114563, I find that the General Counsel has proven all allegations in Complaint paragraph 1 and its subparagraphs.

Both Respondents have admitted the allegations raised in Complaint paragraphs 2, 3(a), 3(b), 4, and 6. Based upon those admissions, I find that the Respondent Employer is a corporation with an office and place of business in Charlotte, North Carolina, and that, in December 2013, it was engaged in the production of a television pilot program, *The Novice*.

Further, based on these admissions, I find that Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that it meets both the statutory and discretionary standards for the exercise of the Board's jurisdiction. Further, I find that at all material times, Transportation Coordinator Davie Beard was Respondent Employer's agent within the meaning of Section 2(13) of the Act.

Both Respondents admit that the Respondent Union is a labor organization within the meaning of Section 2(5) of the Act. I so find.

Complaint paragraph 7 alleges, and Respondent Union admits, that the following individuals were the Union's agents within the meaning of Section 2(13) at all material times: President Ted Russell, Secretary-Treasurer Ernie Wrenn, Vice President/Business Agent Steve Bess, Recording Secretary Frankie Ferrell, Trustee/Business Agent Joe Eason and Trustee Bryan Bechtler. Respondent's answer states that it lacks knowledge and therefore neither admits nor denies.

No evidence contradicts the Respondent Union's admissions that these persons are its agents. The Union, as principal, is uniquely competent to know on which individuals it has conferred the authority of agent. Moreover, it would have no incentive to admit that someone was its agent because such an admission might expose it to liability for that person's actions. For all these reasons, I find that the individuals named in the paragraph immediately above were, at all material times, agents of Respondent Union within the meaning of Section 2(13) of the Act.

Complaint paragraph 7 further alleges that two individuals, identified as officials of the International Brotherhood of Teamsters, were agents of the Respondent Union, Local 71. The Respondent Union admitted that one of them, Ken Hall, was general secretary and treasurer of the International Union, and that the other, Richard Bell, was an executive assistant of the International Union. However, Respondent Union does not admit the alleged agency status. To resolve the issues in this matter, it is not necessary to find that these two individuals either are, or are not, the agents of the Local Union. Therefore, I make no findings regarding their agency status.

Both Respondents admit, and I find that, as alleged in Complaint paragraph 8, at all times, by virtue of Section 9(a) of the Act, Respondent Union has been the exclusive collective-bargaining representative of the following employees of Respondent Employer:

> All employees engaged in providing transportation services in connection with the production of the television pilot *The Novice*, including drivers, truck drivers, dispatchers, and captains; excluding all other employees, guards and supervisors as defined in the Act.

Complaint paragraph 9 alleges that about December 3, 2013, Respondents entered into and maintained an agreement requiring that Respondent Union be the exclusive source of referrals of movie drivers for employment on Respondent Employer's production of the television pilot, *The Novice*. Both Respondents admit that they entered into an agreement on about December 3, 2013, but both deny that this agreement made Respondent Union the exclusive source of referrals. In view of the Respondents' admissions, I find that they did enter

into an agreement, which will be discussed further below. However, at this point, I reach no conclusion about whether this agreement created an exclusive referral arrangement. That issue is central to resolution of this case and will be discussed at length below.

The Referral Agreement

On December 3, 2013, and December 4, 2013, respectively, representatives of Respondent Employer and Respondent Union signed a collective-bargaining agreement titled the "Novice Television Pilot Agreement Between Teamsters Local Union 71 and PACIFIC 2.1 Entertainment Group, INC," which will be referred to below as the "Agreement." By its terms, the Agreement was effective from December 3, 2013, "until the end of this pilot (*Novice*)." Article V of the Agreement provided as follows:

> ARTICLE V
>
> Employment
>
> (a) The parties hereto recognize the conditions in this industry require frequent hiring of drivers on a daily continuing basis. For this purpose the Union shall maintain for the convenience of the Producer and the employee, a referral list which shall in all respects comply with all applicable provisions of law. Drivers from this list will be offered work as needed by the Producer.
>
> The producer agrees to request referral for all drivers required for work covered by the Agreement from the Union. This provision is subject to the following conditions:
>
> (ii) The Producer retains the right to reject any applicant referred from the Union, provided he has a valid reason(s) and further provided he provides the name of the employee to the Union.
>
> The parties agree there is no mandatory staffing requirement.

Two sentences in the language quoted above appear particularly relevant. After providing that the Union shall maintain a referral list, the text goes on to state that "Drivers from this list will be offered work as needed by the Producer." Thus, the provision doesn't merely obligate the Employer to consider drivers on the list but goes further, requiring the Employer to use such listed individuals when it needed drivers.

The next sentence bolsters the conclusion that the Employer must hire from the list. It states "The producer agrees to request referral *for all drivers required for work* covered by the Agreement from the Union." (Italics added) Although the contractual language permits the Employer to reject someone from the list for a "valid reason," it does not provide that the Employer, having rejected the referred driver, could then go to another source or hire a driver not on the referral list.

Thus, the contractual language, on its face, establishes a clear obligation for Respondent Employer to hire employees exclusively from the Respondent Union's referral list. Based on the hearing record, I find that the parties did so in practice.

The Respondent Union's brief observes that "the Board has previously found the Local 71 referral service to be a 'non-exclusive' procedure. *Teamsters Local Union No. 391 and Teamsters Local Union No. 71 (U.S. Pipeline, Inc.)*, 339 NLRB 346 (2003)." However, the cited case arose out of facts significantly different from those present here. In that case, the Board stated:

> [T]he judge found, and we agree, that the evidence fails to establish that the Respondents operated an exclusive hiring hall on the Employer's project. There is no exception to the judge's finding that there was no collective-bargaining agreement between the parties that provided for an exclusive hiring hall. Nor do we find that the evidence establishes that the parties, by agreement or practice, instituted an exclusive hiring hall arrangement.

Teamsters Local 391 (U.S. Pipeline, Inc.), 339 NLRB at 346. However, in the present case, the Respondent Union and Respondent Employer indeed entered into a referral agreement. As discussed above, it clearly provided that Respondent Employer would "request referral *for all drivers* required for work covered by the Agreement." (Italics added) Therefore, I conclude that the case cited by Respondent Union is inapposite. Further, for the reasons discussed above, I conclude that it operated an exclusive hiring hall.

The Alleged Unfair Labor Practices

Complaint Paragraph 10

Complaint paragraph 10 alleges that about "August 12, 2013, Respondent Union, by a letter from President Ted Russell to all movie drivers on Respondent Union's Movie Referral List, threatened to remove any movie drivers from Respondent Union's Movie Referral List if they failed to join or transfer membership to Respondent Union." Complaint paragraph 20 alleges that by this conduct, Respondent Union restrained and coerced employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act.

In its answer, Respondent Employer neither admitted nor denied these allegations, stating that it lacked knowledge. The Respondent Union denies the allegations, in Complaint paragraph 20, that it violated Section 8(b)(1)(A) of the Act.

With respect to the allegations in Complaint paragraph 10, the Respondent Union's answer states, in part, that "IBT Local 71 admits. . .only. . .that about August 12, 2013, Respondent Union sent a letter from President Ted Russell to all movie drivers on Respondent Union's Movie Referral List. IBT Local 71 denies the allegations of ¶ 10 of the Complaint that: the August 12, 2013 letter from President Ted Russell threatened to remove any movie drivers from the Respondent Union's Movie Referral List if they failed to join or transfer membership to Respondent Union."

The Respondent Union long has served as a source of drivers when television and motion picture production companies come to North Carolina to film. With such companies, the Union enters into agreements such as the one with Respondent Employer discussed above which establishes the Union as the exclusive source for such employees. Job seekers register with the Union to obtain such employment and, until August 2013, the Union placed these names on a single referral list. When an employer notified the Union it needed a driver, the Union would consult its list to see which qualified registrant was next in line.

Drivers who did not live in the Charlotte area sometimes wanted to work on a movie production project. Typically, they belonged to other Teamsters local unions closer to their homes. When such job seekers registered with the Respondent Union, their names would be placed on the single referral list which the Union then used.

On about August 9, 2013, the Respondent Union's Executive Board adopted a new referral policy. This new policy did not expressly require job seekers to join as a condition of using the hiring hall. However, it did change the name applied to the monthly amount which an out-of-work referral registrant paid to the Union to remain on the list. This amount had been called an "administrative fee" but the new name was "union dues" or "dues fee." The policy, in its entirety, states as follows:

Teamsters Local Union 71

Movie Entertainment/Pipeline Referral Policy

The following rules have been adopted by Teamsters Local Union 71 to establish the rules and procedures, which are non-discriminatory and which are intended to provide the movie and film industry with a qualified labor source. The following Rules will supersede and replace all previous Rules and Policies.

Registration:

Individuals who wish to apply for the Movie/Pipeline Referral list, must apply in person at the Local Union office. Applicants must pay a registration fee of $300.00 at the time of registration and will be required to pay a dues fee of $30.00 per month when not working. Anyone failing to pay the dues fee for three months, will be removed from the referral list. Once someone has been removed from the referral list the individual must re-register, which will include a new registration fee and the applicant will be placed at the bottom of the referral list. The amount of the registration fee and non-working dues fee will be determined by the Local Union Executive Board and posted at the Local Union office. Individuals on the referral list will be notified of any increases in registration or dues fees.

Referral Procedures:

The Union will refer individuals, on its referral list, to the Employer as follows:

The Union will maintain a "Employee Referral List" arranged in a seniority order, by the dates the individual registered on the list, and the Captain will call the individuals in the order they appear on the list. The member must call back within two (2) hours to select the work. After two (2) hours, the Captain will offer the work to the next most senior qualified member.

Individuals receiving a work call may pass on the call and wait for another position. Individuals passing will maintain their seniority position for work opportunity.

Individuals, on the referral list, must provide and maintain an accurate phone number and address to the Local Union for the purpose of contacting the individual for work opportunity. Anyone, failing to inform the Local Union of a change in their phone number, will have no claim for any lost wages or work opportunity, as a result of an invalid phone number. Any corrected phone numbers or addresses must be submitted in writing to the Local Union and it will be the individual's responsibility to call and check to make sure the information was received.

Only the member may accept or decline a work call. If the Captain calls and leaves a message for work opportunity and the individual calls back before the required number of employees are filled, then that individual will be offered work.

Realizing there may be multiple jobs working at the same time, the Principal Officer will appoint the Captain and steward position for each job.

Dues while working:
Any individual called for work by the Employer shall be required to pay a higher dues rate, which will be governed by Article, X Sec 3,(d) of the International Brotherhood of Teamsters Constitution (currently two and one-half times the hourly rate of pay. <u>If an individual is working for an Employer that deducts the monthly Dues from the employee's check, it is the employees' responsibility to check their pay stubs to see if the dues were properly deducted, and if not, to forward the correct amount to the Local Union by the end of the month for which they were due.</u>

Enforcement:

No individual, referred by the Local Union, has the authority to make any Agreement with any Employer, which may conflict with these Referral Rules or the Collective Bargaining Agreement.

Any individual, who accepts work on a non-union production and fails to notify the Local Union, will be subject to internal union charges.

Any employee, who is justly terminated by the Employer, shall not be eligible for any work referrals for a ninety (90) day period or may be removed from the referral list, depending on the severity of the termination.

Any member who threatens, uses intimidation, coercion, attempts to secure referrals or disrupts the Local Union's proper operation of the Referral List, will be permanently removed from the Referral List.

Any member, providing false information to the Local Union, shall be permanently removed from the Referral List.

Any member, who fails a drug/alcohol test for the hiring or on the job, will be permanently removed from the referral list.

Any member walking off the job, during working hours without the knowledge or permission of the production company, will be removed from the referral list.

Appeals:

The Local Union will notify, in writing, any individual of any violations, which would result in the suspension or removal from the Referral List. Within ten (10) days of receipt of such notice, the charged individual may appeal, in writing, to the Secretary-Treasurer of the Local Union. The appeal must set forth the reasons why the Local Union's actions were unjustified. The Executive Board will schedule and hear the appeal.

The Executive Board reserves the right to amend these Referral Rules at any time. Any amendment approved will become effective (30) days after the amendment is approved and posted at the Local Union office and provided to all registered individuals on the referral list.

Fraternally,

Board Approved - /s/ Ted Russell

August 9, 2013 Ted Russell
President

(Emphasis in original.)

Union President Ted Russell sent copies of this policy to individuals who had used the referral system. His August 12, 2013 cover letter stated, in part, as follows:

Enclosed is the new Movie Entertainment/Pipeline Referral Policy. Please review the new policy.

> Enclosed you will find an authorization form for Teamsters Local Union 71. Please fill this form out and send back to us. If you are presently a member of another Local, you will need to transfer into Local 71 to remain on the referral list. This is the result of the letter I sent to the IBT, requesting that your service fees be counted as membership dues, so you would re-gain your membership status by paying a monthly fee when you were not working. These amended rules will now allow you all membership rights in Local 71 as long as you continue to make your monthly dues payments, which is $30.00 per month when not working and 2 1/2 times rate when working. Please fill out all the spaces on this form and be sure to print legibly, sign and date; otherwise it will not be valid.
>
> Your form must be returned to Teamsters Local Union 71 no later than August 30, 2013. If you have questions, please give me a call 704-363-6486 or 704-596-2475 x224.

Russell's August 12, 2013 letter enclosed not only the new movie referral policy but also a membership application, which began: "I hereby apply for admission to membership and I authorize Teamster's Local Union No. 71. . .to represent me as my exclusive collective bargaining agent until further notice." The form also included language authorizing and directing employers to deduct union dues from the signer's pay.

A union operating an exclusive hiring hall violates Section 8(b)(1)(A) of the Act if it gives preference in referrals to its members. *International Longshoremen Association Local 1423 (Savannah Maritime Association)*, 306 NLRB 942, 946 (1992), citing *Wolf Trap Foundation*, 287 NLRB 1040 (1988); *Cargo Handlers*, 159 NLRB 321 (1966). Likewise, a union violates the Act when its statements reasonably create the impression that it will operate its exclusive hiring hall in a manner which favors union members over nonmembers.

Section 7 of the Act gives employees, including job applicants, the right to choose to engage in or to refrain from engaging in union activity. When a union operating an exclusive hiring hall announces that it will discriminate against applicants who choose to refrain from engaging in union activity, it constitutes unlawful coercion.

The lawfulness of a statement does not turn on the intent of the speaker but rather on the effect it reasonably would have on the employees or job applicants who heard it. Quite clearly, the statements in Russell's August 12, 2013 letter and its enclosures communicate that any job applicant not then a member of Respondent Union had better join it or else he would not get to work. Indeed, Russell's letter says so plainly: "If you are presently a member of another Local, you will need to transfer into Local 71 to remain on the referral list."

Driving the point home, Russell enclosed a membership application. Thus, the letter conveys a clear, unequivocal, and unlawful message.

Complaint paragraph 10 characterizes the statements in the letter as a threat "to remove any movie drivers from Respondent Union's Movie Referral List if they failed to join or transfer membership to Respondent Union." Respondent Union argues in its brief that both the

testimony of the General Counsel's witnesses "and the documentary evidence in the record confirm that, objectively, no 'threats' occurred."

As often used in everyday speech, the word "threat" does evoke images of a fist shaken close to someone's face, but words can satisfy the job description of "threat" without any such melodrama. Indeed, a soft-spoken threat, quietly mumbled by someone known to have the power and willingness to carry it out, can wield potence beyond its decibels.

Moreover, the legal standard to be applied does not involve whether a statement meets some definition of "threat" but whether it restrains or coerces employees in the exercise of Section 7 rights. See 29 U.S.C. Section 158(b)(1)(A). The letter's statement that members of other locals "will need to transfer into Local 71 to remain on the referral list" clearly does restrain and coerce.

Respondent Union's brief cites testimony by three of the referral applicants that they belonged to other Teamsters locals rather than the Respondent. Then, it argues that "each testified that they made an informed decision to retain their existing Teamsters Local Union membership in other locals as a source of referral in the film production industry rather than transfer to Local 71. Each made a conscious decision to accept a 'B' list referral through the Local 71. . ."

This quoted portion of Respondent Union's brief appears to involve two assumptions. First, it seems to conflate the concepts of "informed choice" and "uncoerced choice." Clearly, a choice can be informed but nonetheless coerced. For example, suppose a robber tells someone "your money or your life!" The victim's decision to surrender his wallet certainly would be "fully informed," but few would consider it uncoerced.

Although it is not entirely clear, I believe that Respondent Union's argument also involves an assumption about the nature of protected activity. The Respondent Union's brief seems to imply that the applicants had a Section 7 right to engage in or refrain from engaging in union activity, but already made that decision when they joined other locals of the International Brotherhood of Teamsters. The Respondent Union seems to assume that once the applicants became Teamsters, and subject to union rules, their Section 7 rights somehow were diminished.

In other words, the brief seems to imply (although not state explicitly or elaborate) that linking the referral rights of a Teamster to the local union he chooses is strictly an internal union matter. To be sure, that is a lot to infer from the portion of Respondent Union's brief quoted above. However, in a footnote, the brief cites a provision in the Constitution of the International Brotherhood of Teamsters which provides: "It shall be compulsory for a member to maintain or establish membership in the Local Union under whose jurisdiction he is working. . ." Moreover, in another footnote, the brief states: "Hiring hall rules may be changed by a union. *IBEW Local 164 (NECA),* 190 NLRB 196 (1971), *affd. sub nom, Bleier v. NLRB*, 457 F.2d 871 (3d Cir. 1972)."

Certainly, some strictly internal union matters lie outside the Board's jurisdiction. Therefore, this matter merits serious consideration. After such examination, however, I conclude that the conduct at issue here is not strictly an internal union matter.

It would be odd if the Act gave less protection to a member of a Teamsters local other than Respondent Union than it afforded to a job applicant who belonged to no union at all. Clearly, should someone with no union membership of any kind seek referral through Respondent Union's exclusive hiring hall, the Union could not lawfully require the applicant to join the Union as a condition of referral. Without doubt, telling someone who belonged to no union that to sign the referral list he had to join would violate Section 8(b)(1)(A) of the Act.

Likewise, if a referral applicant happened to be a member of some Union unrelated to the Teamsters, a policy requiring him to join Respondent Union as a condition of signing the exclusive hiring hall's referral list would violate the Act. Absent some very compelling reason, which isn't apparent here, a person's protection under the Act should not diminish because he belongs to one union rather than another.

Moreover, the referral policy at issue here has another adverse effect when applied to an applicant who belongs to another Teamsters local. Such an applicant not only must join the Respondent Union, as a consequence of that decision to "transfer" his membership, he must give up membership in the local union to which he belongs. The policy thus has a brusk negative effective on the applicant's freedom to exercise Section 7 rights.

It also may be noted that the case cited for the principle that a union may change its hiring hall rules does not concern the sort of rule at issue here. That case, which appears in the Board's bound volume with the short title *National Electrical Contractors Association*, 190 NLRB 196 (1971), concerned an allegation that a union, by changing its referral rules, had breached its duty of fair representation. The government did not assert that the rule change restrained or coerced employees in the exercise of any particular Section 7 right, but rather that the change was arbitrary, resulting in some bargaining unit members being treated less fairly than others. That situation is quite different from the present case, where the hiring hall policy affects fundamental Section 7 rights, to join or refrain from joining a labor organization.

In sum, I conclude that the August 12, 2013 letter from Respondent Union's president, informing job seekers that they "will need to transfer into Local 71 to remain on the referral list," unlawfully restrained and coerced employees in the exercise of their Section 7 rights. Therefore, I recommend that the Board find that this conduct violated Section 8(b)(1)(A) of the Act.

Complaint Paragraph 11

Complaint paragraph 11 alleges that about August 2013, Respondent Union, by President Ted Russell, by telephone, threatened movie drivers with loss of work if they failed or refused to join the Respondent Union. Complaint paragraph 20 alleges that this conduct violated Section 8(b)(1)(A) of the Act. The Respondent Union's answer denies these allegations. The Respondent Employer's answer states that it neither admits nor denies the allegations for lack of knowledge.

After receiving the Union president's August 12, 2013 letter, job applicant John Stephens telephoned Russell to discuss it. To the extent that Stephens' description of this conversation differs from that of Russell, I credit Stephens. His demeanor as a witness, especially during

cross-examination, impressed me. Additionally, I note that another witness, Davie Beard, whose position as a coordinator made him familiar with various drivers' work, expressed no reservations about rehiring Stephens. The same steadiness which made Stephens a particularly dependable employee also, I believe, contributed to the reliability of his testimony.

Moreover, the statements which Stephens attributed to Russell are consistent with Russell's other statements and actions. Therefore, I credit Stephens' account of his mid-August 2013 telephone conversation with Russell.

Stephens told Russell that he didn't think it was right that drivers on the movie referral list were being forced to join Local 71. Stephens said that the drivers paid their referral fees and should be allowed to work off the referral list the same as everyone else, as they always had done. Russell replied that those were the new rules and the way it was going to be, that "you'll either join or be moved to the 'B' list."

Stephens said that, if moved to the "B" list, he wouldn't be allowed to work. Russell answered "that's exactly right, you won't be because you'll be moved to the bottom of the list, and that pretty much kills your opportunity for work." Russell added that Stephens probably would not work there again.

In its brief, the Respondent Union argues that Stephens' testimony should not be credited over Russell's and also that, even if credited, Stephens' testimony does not establish a violation of the Act. For the reasons discussed above, I have concluded that Stephens gave reliable testimony, so I turn now to the argument that this testimony did not prove a violation. Respondent Union's brief stated, in part, as follows:

> All that the General Counsel's evidence shows is that Russell explained to Stephens if he did not transfer his Teamsters Local Union membership from Local 399 to Local 71 he would retain his relative registration date on a "B" list. It was Stephens' own speculation, expressed at the hearing that "basically I won't be allowed to work", "[y]ou won't be because you'll be moved to the bottom of the list, and that pretty much kills your opportunity for work" and "I probably would not work here again.", none of which is described as being what Russell said "exactly". No evidence was presented by the General Counsel showing that Stephen's version of his conversation with Russell was disclosed to any other registrant on the Local 71 lists.

Contrary to Respondent Union's argument, I conclude that Stephen's testimony does not offer merely the witness' opinion of what Russell meant but rather describes what Russell said, to the best of the witness's recollection. For example, Stephens testified as follows:

> Q. All right. And what was said in this discussion? Who spoke and what was said?
> A. Well, I just called him and told him that I didn't think it was right. I didn't think that we should be forced to join Local 71. We pay our referral fee.

> We should be allowed to work off the referral list same as everybody, same as we've always done. Ted said these are the new rules. This is the way it's going to be. You'll either join or be moved to the B-list. I said, well, if I'm moved to the B-list, basically I won't be allowed to work. And he said yeah, that's exactly right. You won't be because you'll be moved to the bottom of the list, and that pretty much kills your opportunity for work.
>
> Q. Do you remember, as close as you can remember, what exactly he said about you working in Charlotte?
>
> A. He said that what I had said was true. I probably would not work here again.

Based upon this credited testimony, I find that Russell indeed communicated to Stephens that unless Stephens joined the Respondent Union, he would be placed on a list offering little chance of referral and likely would not obtain work. Although the Respondent Union's brief states, in effect, that no evidence indicates Stephens repeated Russell's words to others, such a further disclosure is not necessary. By making such a statement to even one applicant seeking work through the exclusive hiring hall, the Union violated Section 8(b)(1)(A).

Moreover, Russell's own testimony establishes that he told a number of applicants that "if they didn't join the Local, they would be put on a B-list." That statement by itself would, I conclude, be sufficient to communicate that the Union intended to treat nonmembers less favorably than members. Even without a detailed definition of how a "B-list" differed from an "A-list," the term "B-list" itself reasonably would be understood as a less-favored status with diminished prospects for referral. This understanding is especially reasonable considering the history of the exclusive hiring hall. Until August 2013, the Respondent Union had only one referral list. Dividing it into an "A-List" and a "B-List" implicitly raises the specter of unequal treatment.

A portion of Russell's testimony, quoted in the Respondent Union's brief, provides insight into the message which the union president communicated to a number of job seekers. The testimony immediately follows Russell's statement that he told some of the job seekers that if they didn't join the Local, they would be put on a B-list:[1]

> Q. Now, when you say join, most of the people that you talked with during this time were members of other Teamsters Local Unions, right?
>
> A. There were some, yeah, and I understood that. And I understood why they didn't want to transfer into the 71. I mean someone belonged to Local 399, which is the premier Local in the whole entire country for movies, and they weren't about to give up their membership, but according to IBT [the International Union] you cannot be a member of two Local Unions, you know, or benefits. And that's what I was, you know, basing all this

[1] The excerpt in the Respondent Union's brief slightly changes the order in which Russell made certain statements. Although it would have been well had the brief noted the changed order, the change did not materially affect the meaning. However, Rusell's testimony appears here with order unchanged from the transcript, not as it appears in the brief.

on. I said, if you want to be a Local, member of Local 71, you got to sign an authorization, decide which Local you want to be in. Plain and simple.

Q. And as far as you know, everybody that remained on the B-list made that choice voluntarily?

A. Yeah. You know, I might have talked to two or three. I didn't talk to everybody on that list. Maybe two or three, they told us I'm not going to transfer from my Local. I want to stay where I'm at. One even wrote it back on his authorization form that did not want to transfer. And there's probably some more that sent theirs back to the bookkeeper because she was the one that basically received them, and it was their choice. They didn't want to join Local 71. They wanted to stay with the Local they were at.

Russell's testimony thus links the change in Respondent Union's referral procedure to the International Union's policy that "you cannot be a member of two Local Unions." This reasoning assumes something which the law does not allow, namely, that an applicant's entitlement to use the exclusive referral system is linked to his union membership. The Act requires the opposite.

Russell observed that members of a certain other Teamsters local were not about to give up their membership in that local because it was "the premier Local in the whole entire country for movies." However, even assuming that this local operates an exclusive hiring hall similar to the one in this case, it could not lawfully favor its members over others by creating a preferential, members-only referral list.

Russell's testimony, quoted above, states that some job applicants, upon being informed of the new requirement to join Respondent Union, "voluntarily" decided to "stay with the Local they were at," leaving unsaid but implied that each such person thereby "voluntarily" accepted the consequences of that decision. That misses the point. The Act protects the job seeker's right to decide for himself or herself whether to join a labor organization, and freighting this choice with serious consequences—loss of position on the referral list for the "wrong" decision—restrains and coerces the individual.

A coerced choice hardly can be called "voluntary." Moreover, even if by some lexical legerdemain the word "voluntary" could apply in this circumstance, the voluntariness of the choice could not render lawful that which the Act forbids.

In sum, I find that Respondent Union's president told referral applicant Stephens that he either had to join the Union or else would be moved to the "B-List" and, as a result, probably would not receive opportunities to work. Further, I conclude that such statements constitute unlawful restraint and coercion. Therefore, I recommend that the Board find that Respondent Union, by the conduct alleged in Complaint paragraph 11, violated Section 8(b)(1)(A) of the Act.

Complaint Paragraph 12

Complaint paragraph 12 alleges that about August 19, 2013, Respondent Union, by a letter from Respondent Union's President Ted Russell to all movie drivers on Respondent Union's movie referral list, threatened to transfer movie drivers from the primary "A" Movie Referral List to a newly created secondary "B" Movie Referral List for work opportunities if they failed to join or transfer their membership to the Respondent Union. Complaint paragraph 20 alleges this conduct to violate Section 8(b)(1)(A) of the Act.

Averring lack of knowledge, the Respondent Employer neither admits nor denies these allegations. The Respondent Union admits that on about August 19, 2013, its president sent a letter to all drivers on its movie referral list, but otherwise denies the allegations.

Respondent Union's president actually sent two letters dated August 19, 2013, but only one refers to the "A" and "B" referral lists. It states:

> This letter will serve to inform you that there will be a special meeting for all movie members on Saturday, August 31, 2013. This meeting will take place at 11:00 am. The purpose of this meeting is to bring you up to date on the new rules and any issues that need to be addressed. Only those, who have signed the Local 71 Authorization form, will be allowed to attend this meeting. Those forms must be returned by August 31, 2013.
>
> The current employees, who do not elect to transfer/join this Local, will be placed on a "B" list for work opportunity. I will not require you to pay any fees to be on this list. You will only be required to pay a fee, which will be the IBT dues rate, once you start working.
>
> If you have any questions; relative to this matter, please feel free to call me.

Whether or not this letter restrains and coerces employees in the exercise of Section 7 rights depends on what message its words reasonable would convey. Even by itself, the letter's statement that "current employees, who do not elect to transfer/join this Local, will be placed on a "B" list for work opportunity" carries the message that those who do not belong to the Respondent Union will be treated less favorably. That is true even without a detailed explanation about the "B" list and the consequences of being on it. In common usage, the qualifier "B" connotes something less desirable than "A."

Moreover, another part of the August 19, 2013 letter reinforces the message that union members will receive more favorable treatment. The first paragraph of that letter announces an August 31, 2013 meeting to discuss the new referral system rules but states that only those who signed the Local 71 authorization form will be allowed to attend. As discussed above, that form actually is, among other things, an application for membership in Respondent Union. In other words, only those who were union members, or who had applied to be, could attend the meeting.

The message hardly could be clearer: The Respondent Union was going to give its members more favorable treatment than nonmembers who, because of nonmembership, would be relegated to a "B" list. Moreover, those who read the letter reasonably would infer that being placed on the "B" list so marginalized a job seeker that he would not even be allowed to attend a meeting concerning how the referral system worked.

Accordingly, I recommend that the Board find that, by its August 19, 2013 letter, Respondent Union violated Section 8(b)(1)(A) of the Act.

Complaint Paragraph 13

Complaint paragraph 13 alleges that since about August 9, 2013, Respondent Union, by its Local Union Executive Board, has failed to properly publicize its policies concerning fees for nonmembers using the Movie Referral List. Complaint paragraph 19 alleges, in part, that by this conduct, Respondent has operated its hiring hall in a discriminatory, arbitrary and capricious manner. Complain paragraph 20 alleges that this conduct violates Section 8(b)(1)(A) of the Act.

The Respondent Employer, averring lack of knowledge, neither admits nor denies these allegations. The Respondent Union denies them.

The General Counsel's brief explains the theory of this alleged violation as follows:

> As stated herein above on August 9, Respondent Union issued new hiring hall rules pertaining to movie drivers. (GC 5(a)) The new rules, entitled "Movie Entertainment/Pipeline Referral Policy" did not clearly specify the fee structure for non-members. The rules state, in relevant part, "Applicants must pay a registration fee of $300.00 at the time of registration and will be required to pay a dues fee of $30.00 per month when not working." (GC 5(a)) The rule further states that anyone removed from the referral list for failure to pay the dues fee, must re-register, pay a new registration fee, and then be placed at the bottom of the referral list. (GC 5(a)) The amount of the registration fee and non-working dues fee will be determined by the Executive Board. (GC 5(a)) In this regard, nothing in the dues structure or rules contemplates a registrant being a non-member. Respondent made no explicit effort in the new rules to distinguish between dues charged to members and fees charged to non-members. (GC 5(a)) In this regard, the rules do not explain or specify the fees for non-members when they are out of work. In contrast, the rule clearly states that the dues rate for individuals called for work is two and one-half times their hourly rate of pay. (GC 5(a)) Respondent Union's failure to clearly address the fee structure for non-members appears to be intentional given Russell's admission that it was his intent to remove the administrative fee requirement and make everyone pay union dues. (TR 345, 346)
>
> The operation of a[n] exclusive hiring hall imposes considerable responsibilities on the agents in charge of the hall, including the duty of fairness in regard to access to, and referral from the hall. The Respondent Union's failure to clarify and publicize its dues structure for non-union participants on the basis

> of their status as non-union members is arbitrary, invidious, and discriminatory. Thus, it is submitted that the Respondent Union's August 9 rule failed to properly publicize its policies concerning fees for non-members use of the MRL violates Section 8(b)(1)(A) of the Act. See *International Brotherhood of Teamsters, Local 727*, 358 NLRB No. 86 (2012).

However, Respondent Union argues that Russell's August 19, 2013 letter provides sufficient clarification. After stating that employees who did not transfer into or join the Union would be placed on a "B" list, the letter continues "I will not require you to pay any fees to be on this list. You will only be required to pay a fee, which will be the IBT dues rate, once you start working."

The General Counsel's brief makes clear that the thrust of the alleged violation is a "failure to clarify and publicize its dues structure for non-union participants on the basis of their status as non-union members." (In context, it is clear that the term "dues structure" includes the fees which registrants who did not belong to the Respondent Union would have to pay.) As the General Counsel observes, the August 9, 2013 policy does not specify what fees would be imposed on such registrants. Ten days later, however, Russell's letter makes clear that registrants on the "B" list, that is, job seekers who do not belong to Respondent Union, would not have to pay any fees until they received a referral and began working.

Thus, Respondent Union did indeed clarify the policy. Therefore, I recommend that the Board dismiss the unfair labor practice allegations raised by Complaint paragraph 13.

Complaint Paragraph 14

Complaint paragraph 14 alleges that since about August 19, 2013, Respondent Union, by its Local Union Executive Board, has failed to follow its published hiring hall rules and procedures regarding the referral of movie drivers for work opportunities. Complaint paragraph 19 alleges that by this and other conduct the Respondent Union has operated its hiring hall in a discriminatory, arbitrary and capricious manner. Complaint paragraph 20 alleges that Respondent Union thereby violated Section 8(b)(1)(A) of the Act.

Respondent Employer, averring lack of knowledge, neither admits nor denies the allegations. Respondent Union denies them.

The wording of Complaint paragraph 14 is a bit confusing because it can be read to imply that the Union's executive board was the actor which committed the alleged unfair labor practice. Thus, the language alleges that Respondent Union "by its Local Union executive board" failed to follow the published rules. That would suggest that the executive board's function went beyond formulating and promulgating the policy and that this board also played some role administering and applying it on a day-to-day basis. However, the record does not establish that the executive board, as a body, worked in this fashion.

Rather, the record establishes that the executive board promulgated the new policy on August 9, 2013, and left implementation of it up to Union President Russell. The evidence further shows, without contradiction, that Russell was the one who instituted a system which deviated from the policy. Indeed, the General Counsel's brief states that Russell (rather than the Union's executive board) "effectively amended" the policy which the executive board had promulgated. The brief stated, in part:

> Respondent Union's conduct failed to comply with its published hiring hall rules and procedures without proper notice to hiring hall participants. In this connection, the new rules specifically call for one list, not two, in which drivers will be referred based on seniority. (GC 5(a)) (GC 6, GC 6(a), GC 8) Further, the evidence demonstrates that Respondent Union failed to follow the explicit procedures for amending the rules, in that, Russell's August 19 and September 16 letters effectively amended the rules by creating two referral list without approval by the Executive Board and without allowing for the 30 day notice period. (GC 5(a), GC 6, GC 6(a), GC 8) In this regard, current Respondent Union Secretary/Treasurer Ernest Wrenn stated that the Executive Board approved the August 9 referral rules and that those rules were the last rules pertaining to driver movie referral put in place for 2013. (TR 457, 458) He also acknowledged that the letters sent out by Russell dated August 12 and August 19 were not signed by any Executive Board member. (TR 458, 459) Moreover, there is no evidence that Russell sought approval by the Executive Board prior to distribution of the letters to movie referral list registrants in August and September. (TR 321-350) The evidence clearly shows, based on the Respondent Union's letters dated August 12, August 19, and September 16, that the Union's creation and maintenance of two referral lists was not based on objective criteria, rather it was based on the impermissible consideration of a participant's status as a union member or non-member. Thus, based on the above, it is submitted that Respondent Union failed to follow its published hiring hall rules and procedures in violation of Section 8(b)(1)(A) and (2) of the Act. In this regard, the Board has determined that the manner in which a union maintains a referral list to be unlawful where it is shown to be discriminatory against non-members. See *International Brotherhood of Teamsters, Local 509*, [*(Touchstone Television Productions, LLC d/b/a ABC Studios)*, 357 NLRB No. 138 (2011).]

To the extent that Complaint paragraph 14 alleges that the Union's executive board (rather than the Union's president) failed to follow the Union's published rules and procedures, the language certainly is confusing. However, I do not believe it is so confusing as to deny the Respondents due process. It placed them on sufficient notice that they could prepare defenses.

Russell's action, establishing a two-list referral system which discriminated on the basis of union membership, clearly violated the Act but other Complaint paragraphs focus on its unlawful preference for union members. Complaint paragraph 14 involves a different theory of violation.

Specifically, it alleges that the Union "has failed to follow its published hiring hall rules and procedures. . ." Proving that allegation necessarily requires the government to establish both that the Respondent Union published rules and procedures and also that the Union failed thereafter to follow them. Clearly, on August 9, 2013, the Union adopted a new policy but when was it published?

The record leaves no doubt that the policy adopted by the executive board on August 9, 2013, was published 3 days later, when Union President Russell enclosed it with his August 12, 2013 "Dear Movie Member" letter. However, this letter itself announced another change not mentioned in the August 9, 2013 policy. The letter advised potential hiring hall registrants "you will need to transfer into Local 71 to remain on the referral list." The letter also included a form nonmembers could use to join the Union.

This unlawful requirement was not part of the hiring hall policy which the Union's executive board had promulgated 3 days earlier, but it was not inconsistent with that policy. It simply was an addition to it (an "effective amendment" to it, to paraphrase the General Counsel's brief) set forth for the first time in Russell's August 12, 2013 letter. Recipients of that letter received, at the same time and in the same package, a copy of the lawful policy promulgated by the Union's executive board, together with Russell's unlawful statement that registrants would have to join the Union to remain on the referral list and a form to be used to join.

Respondent Union has admitted that Russell is its agent. Clearly, Russell's action, establishing a two-list referral system, is imputable to the Union even if he acted without the executive board's approval. When recipients read his letter, on Respondent Union's letterhead and signed by Russell in his capacity as union president, they reasonably would have understood it to be an authoritative announcement of union policy regarding operation of the hiring hall. Nothing would prompt a recipient to consider the statements in Russell's letter to be any less official, or entitled to any less credence, than the policy adopted by the Union's executive board on August 9, 2014. That, too, had come to them in a letter signed by Union President Russell.

Indeed, Respondent Union takes the position that its published rules and procedures include *both* the August 9, 2013 policy adopted by its executive board and Russell's subsequent letters. Thus, its brief argues that "Local 71 followed the 'rules and procedures' as outlined in Local 71 President Russell's August 2013 communications with the list registrants in writing, at the August 31, 2013 meeting, and in direct telephone communications with the registrants."

The Union's argument thus requires me to decide whether its "published rules and procedures" consist only of the August 9, 2013 policy adopted by its executive board or also include the referral practices announced in Russell's subsequent letters. Similarly, I must parse the language of Complaint paragraph 14 to ascertain the exact nature of the alleged failure to follow. Only then will it be possible to make a comparison and reach a conclusion.

Job seekers received more than one letter concerning operation of the hiring hall, so I must take care to determine the relevance of each to the allegations in Complaint paragraph 14. The first was Union President Russell's August 12, 2013 letter which enclosed the August 9, 2013 policy adopted by the executive board and which also announced that only union members would be allowed to register. For reasons already noted, someone who received that letter would

have no reason to believe that the August 9, 2013 policy fell within the category of "published hiring hall rules and procedures" but that the unlawful membership requirement did not. Therefore, I conclude that the membership requirement which Russell announced in this letter was just as much a part of the Union's "published hiring hall rules and procedures" as the August 9, 2013 policy.

However, although this members-only rule was unlawful, as alleged in other Complaint paragraphs, it cannot be the subject of Complaint paragraph 14. Russell's August 12, 2013 letter does not fall within the scope of Complaint paragraph 14 because that paragraph alleges that the violation began a week later, on August 19, 2013. On this latter date, Union President Russell sent out another letter, one which announced the establishment of a two-list referral system.

Because Complaint paragraph 14 does not allege any failure-to-follow violation before August 19, 2013, I conclude that it focuses on Russell's announcement of a two-list referral system on that date, not on his announcement of the membership requirement a week earlier. The failure-to-follow violation alleged in Complaint paragraph 14 therefore concerns Russell's announcement and implementation of an "A List" and "B List."

Accordingly, the government's theory of violation must assume that the Union's "published hiring hall rules and procedures" consisted of only the policy promulgated by the Union's executive board on August 9, 2013, and did not include the 2-list policy announced by Union President Russell in his letter 11 days later. Under this theory of violation, Russell's announcement and implementation of the 2-list system constitutes the unlawful failure to follow published rules and procedures.

Certainly, the August 9, 2013 policy adopted by the Union's executive board contemplated a single referral list and made no mention of an "A List" and "B List." Moreover, no evidence suggests that the executive board thereafter decided to revise its policy to create two referral lists and then instructed President Russell to announce this modification.

To the contrary, the record leaves the distinct impression that Union President Russell, not the executive board, came up with the idea of having two referral lists. Further, it seems likely that the idea of replacing the existing single list with an "A" list and a "B" list did not occur to Russell until some time after he had written the August 12 letter to job seekers.

Thus, Russell's August 12 letter does not mention two lists but just the members-only policy, stating "If you are presently a member of another Local, you will need to transfer into Local 71 to remain on *the* referral list." (Emphasis added.) From Russell's reference to "the" referral list, I infer that, on August 12, 2013, Russell had not yet decided to create an "A" list and a "B" list.

The members-only policy announced in Russell's August 12, 2013 letter lies at the heart of the unfair labor practice allegations in the Complaint. The later creation of an "A List" and "B List" simply created the mechanism to implement this discrimination. Nonetheless, because Complaint paragraph 14 alleges a violation beginning August 19, 2014, I conclude that the failure-to-follow-published-rules allegation concerns the establishment of a two-list system rather than the earlier announcement of the members-only requirement.

Even though the two-list system merely facilitated the members-only requirement, it was unlawful in itself because of the discrimination against nonmembers which it accomplished.[2]

However, the record leaves open the question of why Russell adopted the members–only policy itself. The most likely explanation is that Russell was trying to conform to policies of the International Union, which is not a party to this proceeding. In his testimony, Russell referred to an auditor from the International and to conversations with International Union officials. Moreover, the Respondent Union's brief cites Article XVIII, Section 1 of the constitution of the International Brotherhood of Teamsters: "It shall be compulsory for a member to maintain or establish membership in the Local Union under whose jurisdiction he is working. . ." The full text of this provision is quoted below during the discussion of Complaint paragraphs 15 and 16. However, the theory of violation which the government applies in Complaint paragraph 14 does not depend on whether the change itself violated the Act. Under the General Counsel's theory, even an otherwise lawful change could be an unfair labor practice if it constituted a failure to follow an exclusive hiring hall's published rules and procedures.

The record does not establish that the Union's executive board approved the 2-list policy and I rather suspect it did not. Indeed, a comment Russell made during his testimony hints that he and the executive board were at odds. When asked if he were still affiliated with the Union, Russell answered, "Not anymore. I don't want nothing to do with them people." However, the record does not establish when or why the conflict arose.

In any event, Russell's relationship with the Union's executive board is not relevant here because the issue does not concern whether the union president had authority to institute the two-list policy on his own. Regardless of his authority, he published it, and recipients of the August 19, 2013 letter would have no reason to doubt that the letter represented the Union's official position. Therefore, I conclude that the "published rules and procedures" include the two-list policy announced in that letter. Because the two-list policy was part of the Union's "published rules and procedures," its announcement and implementation cannot constitute a failure to follow published rules and procedures.

This conclusion necessarily rejects the General Counsel's position that the hiring hall's "published rules and procedures" include only the August 9, 2013 policy adopted by the Union's executive board and not the policies later announced by the Union's president. In making the argument that only the policy promulgated by the executive board was "published," the General Counsel has to go beyond the question of what expressions of policy were, in fact, published,

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[2] Complaint paragraph 19 alleges that the Respondent Union operated its hiring hall in a discriminatory, arbitrary and capricious manner, in part by the conduct described in Complaint paragraph 14, which is being examined here, involving the establishment of a 2–list referral system. Without doubt, this system, relegating nonmembers to a "B List," is discriminatory regardless of Russell's reason for creating it. However, his reason may shed light on whether it was arbitrary and capricious.

Possibly, Russell's creation of a "B" list may have been partly cosmetic, an after–the–fact attempt to put some powder on the ugly nose of the discriminatory members–only referral policy and conceal its character. Another motivation may have been a true concern about the harshness of the members–only policy and a desire to lessen it.

that is, what policies were disseminated to union members and those seeking to use the hiring hall.

The General Counsel's definition of "published" does not turn on whether there was an actual publication of the two-list referral policy but on whether this policy had been duly promulgated in accordance with the Union's internal procedures. This conflation of "published" with "duly promulgated" becomes apparent in the following passage from the General Counsel's brief:

> [T]he evidence demonstrates that Respondent Union failed to follow the explicit procedures for amending the rules, in that, Russell's August 19 and September 16 letters effectively amended the rules by creating two referral list without approval by the Executive Board and without allowing for the 30 day notice period.
>
> In this regard, current Respondent Union Secretary/Treasurer Ernest Wrenn stated that the Executive Board approved the August 9 referral rules and that those rules were the last rules pertaining to driver movie referral put in place for 2013. (TR 457, 458) He also acknowledged that the letters sent out by Russell dated August 12 and August 19 were not signed by any Executive Board member. (TR 458, 459) Moreover, there is no evidence that Russell sought approval by the Executive Board prior to distribution of the letters to movie referral list registrants in August and September.

Thus, the government's argument focuses on whether the Union's executive board approved or authorized the Union's president to modify the rules. However, this question is irrelevant to whether the rules were *published,* as alleged in Complaint paragraph 14. Moreover, there are significant reasons why Complaint paragraph 14 would allege a violation based on a failure to follow *published* rules and procedures rather than a failure to follow "duly promulgated" rules and procedures.

Substitution of "duly promulgated" for "published" would have changed the theory of violation totally. As the quoted portion of the General Counsel's brief demonstrates, an allegation of failure to follow "duly promulgated" rules and procedures necessitates inquiry into internal union matters to a much greater extent, thereby raising additional issues.

A violation based on an alleged failure to follow *published* rules rests on the simple principles that an exclusive hiring hall has a duty to tell potential registrants how it works and they are entitled to rely on this information. A violation occurs when a union running such a hiring hall tells job seekers one thing and then does another.

In the present case, the Union said one thing and then did it. The thing it did violated the Act, but not because it differed from what the Union said it would do.

To use an extreme analogy, if an armed robber said "give me your money or I'll shoot you" and then shot the noncompliant victim, he would surely break the law, but not because he failed to keep his promise. Here, the Union violated the Act both by publishing a coercive and discriminatory policy and then by doing what it said it would do.

In sum, the Union committed an unfair labor practice not by failing to follow published procedure but instead by following it, because the published procedure itself was unlawful. Therefore, I recommend that the Board dismiss the allegations arising from Complaint paragraph 14.

Complaint Paragraphs 15 and 16

Complaint paragraph 15, as amended at the hearing, alleges that Respondent Union, about December 3, 2013, failed and refused to refer to employment with Respondent Employer drivers who appeared on the "B" movie referral list including, but not limited to, drivers Pam Ray, John Stephens, Joe Cook, John Reynolds and Jerry Luckey. The Respondent Union denies these allegations. Respondent Employer's answer "admits that Pam Ray, John Stephens, Joe Cook, John Reynolds and Layla Danielle Jones were not. . .listed on the Movie Referral List reviewed with the Respondent as part of the hiring of employees for The Novice. However, Jerry Luckey was in fact listed on the Movie Referral List."

Complaint paragraph 16 alleges that Respondent Union engaged in these failures and refusals to refer because the drivers were not its members. Complaint paragraph 19 alleges that Respondent thereby operated its hiring hall in a discriminatory, arbitrary and capricious manner. Complaint paragraph 20 alleges that the conduct violated Section 8(b)(1)(A) of the Act, and Complaint paragraph 21 alleges that the same conduct violated Section 8(b)(2) of the Act. The Respondent Employer, averring lack of knowledge, neither admits nor denies these allegations, but the Respondent Union denies them.

On about December 3, 2013, the Respondent Union provided a list of drivers to Transportation Coordinator Davie Beard. Both Respondents have admitted that Beard is Respondent Employer's agent within the meaning of Section 2(13) of the Act.

The names of the following drivers, who were not members of Respondent Union, did not appear on the list which the Union furnished Beard: Pam Ray, John Stephens, Joe Cook, and John Reynolds. The name of another driver alleged to be a discriminatee, Jerry Luckey, does appear on the list. Unlike Ray, Stephens, Cook and Reynolds, Luckey did join Respondent Union, but he did so after the August 30, 2013 deadline specified in Russell's August 12, 2013 letter ("Your form must be returned to Teamsters Local Union 71 no later than August 30, 2013.")[3], resulting in his name appearing lower on the list.

The record clearly establishes that, as alleged in Complaint paragraph 15, about December 3, 2013, Respondent Union failed and refused to refer for employment with Respondent Employer the following drivers: Pam Ray, John Stephens, Joe Cook, and John Reynolds. I so find.

[3] Luckey testified that he did not receive notice that he had to complete the application for membership form and return it to the Union by August 30, 2013. Based upon my observations of the witnesses, I credit this testimony.

Additionally, I find that although Respondent Union did place Jerry Luckey's name on the referral list, it accorded him a lower position on the list because he was not a member of Local 71 by August 30, 2013.

Further, credited evidence establishes that Respondent Union engaged in this conduct because the drivers were not members of the Union, as alleged in Complaint paragraph 16. I so find.

Now, I turn to the legal conclusions to be drawn from these factual findings. Specifically, I consider whether Respondent Union's operation of its exclusive hiring hall was discriminatory, arbitrary and capricious, as alleged in Complaint paragraph 19, whether Respondent violated Section 8(b)(1)(A), as alleged in Complaint paragraph 20, and whether it violated Section 8(b)(2) of the Act, as alleged in Complaint paragraph 21.

Lawfully, a union cannot operate a hiring hall to discriminate based on an employee's lack of union membership. *Stagehands Referral Service, LLC*, 347 NLRB 1167 (2006); *Bricklayers Local 7 (Masonry Builders)*, 224 NLRB 206 (1976), enfd. 563 F.2d 977 (9th Cir. 1977); *Utility & Industrial Construction Co.*, 214 NLRB 1053 (1974); *Elevator Constructors Local 6 (Westinghouse Electric Corp.)*, 204 NLRB 578 (1973). However, uncontradicted evidence, both documentary and testimonial, establishes that Respondent Union did exactly that, refusing to allow the names of certain job seekers on its main referral list because they were not members but instead were members of other Teamsters locals.

The credited evidence, discussed above, convincingly and unequivocally establishes that such discrimination took place. This discrimination is particularly apparent both in the testimony of driver John Stephens concerning his conversations with Union President Russell, and in the experience of driver Jerry Luckey, whose name appeared on the "A List" only after he became a member of Respondent Union. Therefore, I turn to the Respondent Union's defenses.

The Respondent Union's brief contends that its hiring hall was not the exclusive source of referrals. However, I have rejected that argument for reasons discussed above.

The Union's brief further argues that "under the Local 71 referral list registration procedures adopted by the Local in August 2013, and *the voluntary selection those alleged discriminatees made to retain their membership in other Teamsters Local Unions* and place themselves on the "B" list for referrals from Local 71, the General Counsel has failed to meet his burden of showing restraint or coercion on the exercise of Section 7 rights. . ." (Italics added.)

From the viewpoint of a job seeker who happened to belong to another Teamsters local, the apt word to describe the choice is not "voluntary" but "Hobson's." Such a job seeker faced a take-it-or-leave-it choice clearly affecting his exercise of Section 7 rights. Only those on the "A List" had a significant opportunity for employment, but to obtain a place on this list the applicant had to give up his current union membership and join the Respondent Union.

Because the Respondent Union operated an exclusive hiring hall—the Respondent Employer had agreed in writing to fill all its bargaining unit driver needs by requesting referral through the Union—a job seeker could not simply contact the Employer, fill out a job application and be hired. Rather, such a person had to go through the Union, which controlled the only gate. In these circumstances, telling someone that he must give up membership in the union of his choice and become a member of Local 71, or else the gate would remain closed, constitutes restraint or coercion in the exercise of Section 7 rights. Indeed, it places a burden both on the right to engage in union activity, by maintaining membership in another local, and on the right to refrain from union activity, namely, the right not to join of Local 71.

Considering the obvious effect of relegating nonmembers to a "B List"—the Union president told Stephens it "pretty much kills your opportunity for work"—it is difficult to discern the Union's logic in contending that there was no coercion. Likewise, even a poetic reading of the precedents cited by the Union fails to reveal how these cases support the Union's arguments.

The Union's brief, citing the Supreme Court's decision in *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961), states that "the General Counsel must show coercive conduct by the Union under Section 8(b)(1)(A) of the Act, leading to discrimination in employment under Section 8(b)(2) of the Act, to prove a violation. . .Because the record evidence. . .shows no coercive conduct this complaint should be dismissed in its entirety."

However, in the cited *Teamsters Local 357*, the Supreme Court did not try to stake out the parameters of "coercion." Rather, the Court held that discrimination in employment could not be inferred from a hiring hall agreement which, on its face, provided that referrals would be made *irrespective of union membership or nonmembership*. 365 U.S. at 675.

The hiring hall policy announced by Union President Russell does not include "irrespective of union membership" language but, in essence, the exact opposite. The policy announced by the Union's president explicitly provides that various registrants *will* be treated differently based upon union membership, specifically, based on membership in another Teamsters Local. Moreover, because the hiring hall is exclusive, its discrimination on the basis of union membership necessarily results in discrimination in employment.

To the extent that the *Teamsters Local 357* opinion has relevance to the issue of "coercion," the light it sheds does not shine in the direction the Respondent Union would wish. The Supreme Court's opinion underscores that the Act does not outlaw all conduct which might encourage or discourage union membership but only such encouragement or discouragement which is accomplished by discrimination in employment. 365 U.S. 674–675.

Thus, to make its case, the government does not have to prove that the Union effected coercion by, for example, brandishing a blunt object. Wielding an exclusive hiring hall in a manner which discriminates against nonmembers suffices, because it reduces their opportunity to obtain employment.

The facts in the present case have a curious wrinkle which may warrant discussion. The Respondent Union's new hiring hall policy discriminated against a jobseeker who met two criteria: (1) The jobseeker was not a member of Local 71 but (2) was a member of another Teamsters local. Clearly, an exclusive hiring hall may not lawfully discriminate against jobseekers who belong to labor organizations totally unrelated to the one which operates the hiring hall. However, does it make a difference if the discrimination operates against jobseekers who are members of another local of the same International Union?

Complaint paragraph 5 alleges that the Respondent Union is a labor organization within the meaning of Section 2(5) of the Act, and the Respondent Union admits this status. From this admission, I conclude that it has an identity distinct from that of other Teamster local unions and from the International Union. (In this regard, it may be noted that although Respondent Union has admitted that two individuals hold offices with the International Brotherhood of Teamsters, it has denied that these two International officers are its agents.)

Moreover, the Respondent Union's new hiring hall policy discriminates in two ways. It not only places nonmembers at a disadvantage but also confers on its own members an advantage. Causing an employer to engage in discrimination which encourages union membership violates Section 8(b)(2) to the same extent as causing discrimination which discourages union membership.

The Union seeks to justify its action by citing a provision in the International Union's constitution. Its brief states: "[E]ach of the alleged discriminatee Teamsters members of other local unions made a voluntary choice to either transfer to Local 71, as contemplated under IBT Constitution Article XVIII, Section 1, or remain members of other Teamsters Local Unions with the rights of registration offered in those Locals."

The cited provision of the International Union's constitution provides as follows:

> Article XVIII
>
> TRANSFER AND WITHDRAWAL CARDS
>
> Issuance of Transfer Card
>
> Section 1. *It shall be compulsory for a member to maintain or establish membership in the Local Union under whose jurisdiction he is working*, subject to agreements approved by the General Executive Board pursuant to Section 2(d) or Section 5 of this Article. However, an employee of a Joint Council, State and Multi-State Conference, or the International Union shall not be required to transfer membership because of assignments outside of the jurisdiction of the Local Union of which he is a member. *If a member continues to work under the jurisdiction of a Local Union of which he is not a member after having failed to apply for a transfer card* as specified herein or after refusing to comply with an

> award transferring his membership, *either the Local Union of which he is a member or to which he should transfer may bring charges* for violation of this Constitution under Article XIX. Refusal to issue a transfer card or to approve a transfer may be appealed to the General President and thereafter to the General Executive Board in accordance with the appeal procedures provided for in this Constitution, excluding, however, appeal to the Convention. [Italics added]

By citing this provision in the International Union's constitution, the Respondent Union provides an explanation for its action, but an explanation is not necessarily a justification. Obviously, an international union cannot, by promulgating a rule binding on its local unions, shield those locals from their duty to comply with the Act.

In circumstances such as those present here, a union bears the burden of establishing that the way it operates an exclusive hiring hall is necessary for effective performance of its representational function. *Stagehands Referral Service, LLC*, 347 NLRB 1167 (2006); *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985) enfd. mem. 843 F.2d 1392 (6th Cir. 1988); *Boilermakers Local 433 (Riley Stoker Corp.)*, 266 NLRB 596 (1983). Therefore, the Respondent Union must provide a satisfactory reason why it could not perform its duty to represent the job applicants it dispatched under the referral agreement unless those individuals were its members.

The Union has not offered such an explanation and it would be hard pressed to do so. It has admitted that it is the exclusive collective-bargaining representative, pursuant to Section 9(a) of the Act, of the bargaining unit described in Complaint paragraph 8. That status as exclusive representative imposes on the Union a duty to represent every employee in the bargaining unit, whether that person is a union member or not.

The Union has not explained how the rule in question would be necessary for it to perform its representation function and it also has not demonstrated how the rule would serve any other legitimate interest. Rather, in its brief, the Union appears to rely on precedent which is not really helpful to its position.

> Because the Local 71 procedures used in staffing *The Novice* production in December 2013 are completely distinguished from those cited in *Teamsters Local 509 (ABC Studios)*, 357 NLRB No. 138 (3022) and similar cases owing to the voluntary choice authorized under the IBT Constitution made by the registrants in August, 2013, similar to the registration rule found valid in *IBEW Local 6 (San Francisco Electrical Contractors)*, 318 NLRB at 130, the Complaint in Case 10-CB-114563 and its consolidated Case 10-CA-120024, should be dismissed in its entirety.

Contrary to the Union's brief, I do not find the present facts to be "completely distinguished" from those in *Teamsters Local 509 (ABC Studios)*. In that decision the Board stated "the Respondent operated an exclusive hiring hall that excluded nonmembers. . .The operation of such a hiring hall violates the Act. See *Morrison Knudsen*, 291 NLRB 250, 259 (1988) (union that operates an exclusive hiring hall is obligated to refer individuals without regard to their union membership or lack thereof)." *International Brotherhood of Teamsters,*

Local 509 (Touchstone Television Productions, LLC d/b/a ABC Studios), 357 NLRB No. 138, slip op. at 1 (2011). Similarly, in the present case, Respondent Union operated an exclusive hiring hall in a manner which excluded nonmembers from, if not referrals altogether, at least from the list which provided the most referral opportunities.

The Respondent Union's brief, quoted above, also asserted that its hiring hall rule was similar to the registration rule "found valid" in *International Brotherhood of Electrical Workers, Local 6, AFL–CIO (The San Francisco Electrical Contractors Assn.)*, 318 NLRB 109 (1995). However, in that case, the Board did not "find valid" the rule under consideration. The judge had found the rule unlawful both as applied and on its face, but the Board, agreeing that the rule was violative as applied, found it "unnecessary to pass on the judge's alternative finding that the eligibility rule is unlawful on its face." 318 NLRB at 110. Accordingly, there was no finding in that case regarding the facial validity of the eligibility rule in question.

In sum, I reject the Respondent Union's arguments. Further, I recommend that the Board find that Respondent Union, by the conduct alleged in Complaint paragraphs 15 and 16, violated Section 8(b)(1)(A) and 8(b)(2) of the Act, as alleged.

Complaint Paragraph 17

Complaint paragraph 17, as amended at hearing, alleges that about December 2013, Respondent Employer refused to hire or consider for hire drivers Pam Ray, John Stephens, Joe Cook, John Reynolds, and Jerry Luckey. Both Respondents deny these allegations.

Complaint paragraph 18 alleges that the Respondent Employer engaged in this conduct because Ray, Stephens, Cook, Reynolds and Luckey refrained from joining Respondent Union. Both Respondents also deny these allegations.

Complaint paragraph 22 alleges that by this conduct, Respondent Employer has been discriminating in regards to the hire or tenure or terms and conditions of employment of its employees, thereby encouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act. Both Respondents deny these allegations.

As discussed above, the referral list ("A List") which Respondent Union provided to Respondent Employer did not include the names of Ray, Stephens, Cook and Reynolds. Luckey's name appeared on the list but at a lower position than it would have enjoyed had Respondent Union not delayed in adding it to the list. The evidence establishes that Respondent Union delayed because Luckey had not become a member by the August 30, 2013 deadline.

The General Counsel cites *Wolf Trap Foundation*, 289 NLRB 760 (1988) for the principle that employers will be jointly and severally liable for a union's discriminatory operation of a hiring hall if they know, or can be reasonably charged with notice of a union's discriminatory conduct. Although Respondent Employer denies having had knowledge of the Respondent Union's practices, the government argues that it can be charged with such knowledge. The General Counsel's brief states:

> [I]t is submitted that, based on record evidence, Respondent Employer had actual knowledge and constructive knowledge of the discriminatory operation of its referral system. In this regard, the evidence shows that Davie Beard, an admitted agent of Respondent Union, was placed on notice by his discussions with Parkinson and with his brother Keith Beard about the unlawful changes in the movie referral list. Moreover, the testimony of Russell and Beard's admission that they reviewed the list which failed to include any non-members clearly demonstrates Beard's knowledge of Respondent Union's discriminatory treatment of non-members, including his brother, Keith Beard. Based on the above circumstances taken as a whole, it is reasonable to charge Respondent Employer with knowledge of the Respondent Union's discriminatory conduct.

Although the government asserts that "the evidence shows that Davie Beard. . .was placed on notice by his discussions with Parkinson and with his brother Keith Beard," it does not provide transcript citations to specific testimony which would support that conclusion. My own review of the record leads me to conclude that credible evidence does not carry the burden of proving that Respondent Employer knew or should have known that the Respondent Union was operating the hiring hall improperly.

Under the referral system established by the parties' agreement, the Respondent Employer deals with the hiring hall through a representative with the title "transportation coordinator." The parties have admitted that this individual, Davie Beard, is Respondent Employer's agent.

The record suggests that Beard's most important duty, or at least one of the most important, involved making sure that the drivers referred by the Union met the Employer's standards. A provision in the parties' referral agreement allowed the Employer to reject any applicant referred from the Union, provided that the Employer had a valid reason.

A motion picture producer cannot easily predict in advance how many drivers will be needed on a particular day of filming because circumstances change rapidly. Moreover, the deadlines involved in location filming can be expensive to break, making even a short delay costly. Such delays would occur if the Employer waited to reject a driver until the hiring hall actually referred that individual.

Therefore, representatives of the Employer and Union meet before the referral process begins and go over the names of registrants seeking referral. At this meeting, the Employer's representative informs the union representative of any objections to specific individuals and explains the reasons for such objections. The union representative then removes these drivers from consideration and their names do not appear on the list used for referrals.

The record suggests that, by custom, the Employer's representative does not even look at this final list, let alone have a copy of it. Rather, the Union's agent, called the "captain," has custody of the list and makes referrals from it when the Employer requests drivers.

In this instance, the "captain" was Rick Reynolds Parkinson. From an organization chart, it might simply appear that Parkinson worked for Transportation Coordinator Beard, but in fact he played a vital role in the functioning of the Union's hiring hall, receiving information from the Employer concerning how many drivers would be needed and satisfying those needs by referrals from the list.

In these circumstances, I find that Respondent Employer's transportation coordinator did not see the final list the Respondent Union used in making referrals. This finding is based, in part, on the following testimony of Transportation Coordinator Beard, which I credit:

> Q. Could you have--since Mr. Parkinson reported to you and was making the phone calls, could you have asked him for a copy of the referral list?
> A. It was my understanding that that was not supposed to be given to me, that that was the captain's duties and that he was supposed to maintain that list.

Although Beard did not see the actual list used to make referrals, he had an earlier opportunity to assure that drivers unacceptable to the Employer were excluded from it. On about December 4, 2013, Union President Russell met with Beard to go over the names of hiring hall registrants.

Beard's testimony concerning this meeting conflicts in certain respects with Russell's. For example, Beard testified that Russell called out the names of hiring hall registrants and, in response, Beard would voice any objections to that person. However, Russell testified that he and Beard went over the list, and Russell "showed him who was available on it."

According to Russell, after he had marked the list to exclude the drivers unacceptable to the Employer, he gave the modified list to Beard to give to the captain, Parkinson, who would use it in making referrals. However, Beard testified that Russell left the list on a desk for Parkinson.

Based on my observations of the witnesses, I credit Beard's testimony. Therefore, I conclude that Beard never saw the list itself. However, even if Beard had seen the list, it would not have placed him or the Employer on notice. The referral list shows the registrant's name, telephone number and certain other information, but does not indicate whether a registrant is a member of Respondent Union, another union, or no union at all. In the absence of information showing who was and who was not a member of Respondent Union, the list would not reflect whether the hiring hall favored members over nonmembers.

The General Counsel's brief also asserts that Keith Beard, the brother of Respondent's transportation coordinator Davie Beard, placed the latter on notice that the Union was operating its hiring hall in a manner which discriminated against nonmembers. Keith Beard's testimony does not lead me to that conclusion.

Keith Beard did state that he had a conversation with his brother "about the checkoff that they had sent out because I had already signed the checkoff page." However, his testimony concerning this conversation is so general it remains unclear what he said, if anything,

concerning the hiring hall's referral policies. In the following portion of Keith Beard's testimony, "he" refers to Davie Beard:

> Q. Okay. And what did you say to him and what did he say to you?
> A. I said that I had gotten another check-off, you know, wanting to know about transferring my membership from 745.
> Q. To 71?
> A. To 71.
> Q. All right. And what did he say to you?
> A. He said that he thought everyone had gotten two checkoff sheets about signing up because the people that weren't members are the ones that were working here as referrals. Everyone had gotten a check-off sheet to sign to be a member of the Local because people were here who weren't members. They were just on referral.
> Q. Did you ask him for any advice?
> A. I said, well, I work out of 745, and that's my home Local. I said do you think I should transfer. He said that was up to me.

The General Counsel bears the burden of proving that Respondent Employer either knew or reasonably should have known that the Respondent Union was requiring nonmembers to join as a condition of being placed on the "A List." However, nothing in Keith Beard's testimony indicates that he told his brother that the Respondent Union was requiring membership as a condition of referral.

Stated another way, it would not be unlawful for the Union to invite registrants to become members or to send them forms for that purpose so long as the Union did not communicate that the registrants had to do so or that the hiring hall would treat them less favorably if they did not. Keith Beard's testimony does not establish that he told his brother that Respondent Union had imposed such a requirement or communicated it to referral registrants. The General Counsel called both Keith and Davie Beard as witnesses, and thus had the opportunity to examine them further about this conversation. The absence of more specific testimony is consistent with the conclusion that the Beards spent little time discussing the topic.

Moreover, the Section 8(a)(3) and (1) unfair labor practices alleged in the Complaint concern Respondent's failure to hire certain drivers for work on a production, *The Novice*, which began in December 2013. More specifically, the Employer and Union executed their agreement for this project on December 3 and 4, 2013. However, the conversation between Keith and Davie Beard, described above, took place earlier, sometime in late summer or early fall, when Respondent Union's hiring hall was providing drivers to Respondent Employer for another production.

To prove that Respondent Employer knew or reasonably should have known that Respondent Union's exclusive hiring hall was discriminating against nonmembers, the General Counsel also relies on the testimony of Rick Reynolds Parkinson, who was the "captain" reporting to Davie Beard in the summer of 2013. Parkinson testified, in part, as follows:

Q. David Beard, okay. Did you have occasion to talk to Mr. Beard, David Beard, in the late summer of 2013 about the changes that the Union was making on the movie referral lists?
A. I mean everybody had conversation.
Q. Okay.
A. We all worked Homeland. There was about 30 or 40 guys, and everybody talked about it.
Q. Do you recall a specific conversation where you and Mr. Beard were talking about the changes? Did he express an opinion to you?
A. Well, a few of us were talking one day, and *I believe Davie might have said* that, you know, there could be some trouble with the way that Ted went about having the list changed.
Q. Do you recall him saying something to the effect that the changes, he didn't think that those changes would fly with the Local drivers?
A. I don't know if he actually said fly or not. I know we just had a little discussion about how Ted changed the list and that there might be some people that were disgruntled about it. [Italics added.]

Parkinson's use of the words "might have said" raises doubts about the reliability of his testimony, but my concerns begin earlier. When the General Counsel asked Parkinson if he had talked with Davie Beard "about the changes that the Union was making on the movie referral lists," Parkinson replied, "I mean everybody had conversation." That would seem an unlikely answer if Parkinson possessed a memory of an actual, specific conversation with Beard. His subsequent use of the phrase "might have said" simply increases my concerns about confabulation.

A lack of foundation—the absence of information on when and where the conversation took place and who else was present—compounds these doubts. Indeed, even after the General Counsel tried to refresh Parkinson's recollection with his pretrial affidavit, the witness did not provide any additional detail:

Q. All right. Isn't it true that David Beard told you that the changes were, that were being made, he didn't see how they were going to fly with the Local drivers who were already on the list; isn't that correct?
A. Yes.

This brief answer to a leading question does not increase my confidence about the reliability of Parkinson's testimony. Moreover, agreeing that "David Beard told you that the changes were being made, that were being made, he didn't see how they were going to fly" reveals nothing about the "changes" which Beard supposedly described to Parkinson. It does not disclose whether or not Beard said anything to indicate that the Respondent Union was requiring registrants to be members or relegating nonmembers to the less desirable "B List." In this regard, the record leaves open the question of how much, if anything at all, Beard knew about the existence of a "B List."

Davie Beard credibly testified that a movie production site is rife with rumors. Even if the conversation described by Parkinson took place, it might well have concerned a matter of idle speculation.

In *Wolf Trap Foundation for the Performing Arts*, 287 NLRB 1040 (1988), the Board held that an employer which had entered into an exclusive referral arrangement with a union would not be held liable for the union's discriminatory operation of that system unless the employer had actual knowledge of the union's discriminatory conduct or reasonably could be charged with such knowledge. In the present case, the General Counsel does not assert, and the evidence does not establish, that Respondent Employer had actual knowledge of the Union's unlawful conduct.

On its face, the referral agreement between Respondent Employer and Respondent Union does not discriminate unlawfully. For the reasons discussed above, I conclude that credible evidence also does not support a conclusion that the Respondent Employer could reasonably be charged with knowledge of the Union's discriminatory conduct. Therefore, I recommend that the Board dismiss the Section 8(a)(3) and (1) allegations.

REMEDY

To summarize, I have found that the Respondent Union violated Section 8(b)(1)(A) of the Act by the conduct alleged in Complaint paragraphs 10, 11, 12, 15 and 16 but did not violate the Act by the conduct alleged in Complaint paragraphs 13 and 14. Additionally, I have found that Respondent Union violated Section 8(b)(2) of the Act, by the conduct alleged in Complaint paragraphs 15 and 16.

Because I have also found that Respondent Employer did not violate the Act, I deny the government's request to impose joint and several liability on the Respondents and conclude that the Respondent Union bears sole responsibility to remedy its unlawful actions. To do so, the Respondent Union must take certain actions, including posting the Notice to Members and Employees[4] attached to this decision as "Appendix A."

The General Counsel also argues that the Union should be required to mail the Notice "to all hiring hall users during the period of the discrimination, specifically the period of August 12, 2013, the date the Union first notified the hiring hall users of the new membership requirement, through January 9, 2014, the date the Employer ceased using drivers on the 'Novice' production."

[4] Because I am recommending dismissal of the Section 8(a)(1) and (3) allegations, the inclusion of the word "Employees" in the Notice may warrant explanation. A notice directed solely to members would be underinclusive because the unfair labor practices primarily affected those jobseekers who did not belong to the Respondent Union. The recommended remedy includes requiring the Union to mail a copy of the Notice to all individuals who used the hiring hall during the specified period. The Notice which arrives in a nonmember's mailbox appropriately should reflect that it is to all individuals who use the hiring hall, not just Respondent Union's members. Those who seek employment through Respondent Union's hiring hall clearly are bona fide job applicants and thus fall within the statutory definition of "employee." See, e.g., *Architectural Glass & Metal Co.*, 316 NLRB 789 (1995); *NLRB v. Town & Country Electric*, Inc., 516 U.S. 85 (1995).

Requiring a respondent to mail the Notice is not the ordinary remedy, but I conclude that it is warranted in this case for two reasons. Motion picture productions tend to attract drivers with previous experience in this industry, so those seeking to register with and use the hiring hall often do not live close to it. They would be unlikely simply to walk into the union offices and read the notice.

More importantly, the Respondent Union committed some of the violations by mail. Union President Russell announced the unlawful referral policy by sending letters to drivers likely to register for referrals. A letter addressed to a particular individual and delivered to his door is likely to be read and kept, and therefore likely to have a greater coercive effect. Mailing the remedial Notice therefore is necessary to counter and neutralize the harm caused by the unfair labor practices.

Respondent Union also must make whole, with interest, the discriminatees named in the Complaint, as amended. Because the General Counsel has included a compliance specification with the Complaint, backpay issues typically deferred until a later hearing are before me now and will be addressed below.

The Board takes into account that the payment of backpay in a lump sum, notwithstanding that it accrued over a period of more than 1 year, can result in a discriminatee having to pay more in taxes than he or she would have had to pay otherwise. The Board therefore requires a respondent to make the discriminatee whole for any such excess tax liability. Because the Compliance Specification alleges, and the evidence establishes, that no excess tax liability accrued to any discriminatee in this case, I do not include in the recommended order a separate requirement that Respondent Union make the discriminatees whole for such amount.

Compliance Determinations

Search for Work

In general, when a respondent's unfair labor practices result in a loss of employment, the discriminatee has a duty to mitigate the loss by seeking work. Here, the Respondent Union asserts that certain of the discriminatees have failed to satisfy that duty. For example, with respect to driver John Stephens, the Union's brief states, in part:

> Neither Mr. Stephens, nor any other discriminatee claimed any search for work expenses during the backpay period as a result of searching for interim employment. [GC Exh. 1(x); Compliance Spec. ¶ 29(b)] These facts alone raise a significant question regarding Mr. Stephens' eligibility for back pay in this matter. But there is more.

Before reaching the "more," I will consider the Union's argument concerning backpay expenses. The Union bears the burden of proving the claimed failure to mitigate. However, the fact that the Compliance Specification does not include expenses related to the search for work has little probative value, if any at all.

In a past age, a search for work might indeed have resulted in an expense for gasoline or, earlier, hay for the horse. However, the telephone and Internet make it possible to conduct a job search at no extra expense. Indeed, to a significant extent the Internet has transformed the process of looking and applying for a job. This technology has become many individuals' regular way of finding work, and the Board only requires a discriminatee to seek employment using his regular method. *Wright Electric, Inc.*, 334 NLRB 1031 (2001).

Moreover, as the General Counsel's brief points out, registration at the hiring hall constitutes conclusive evidence of a discriminatee's ongoing search for work. *Teamsters Local 186 (Associated General Contractors)*, 319 NLRB 151 (1995). The discriminatees here were seeking work through Respondent Union's hiring hall.

Obviously, conclusive evidence that the discriminatees made a sufficient search for work makes it impossible for the Union to carry the burden of proving an insufficient search. However, even if this evidence were not deemed conclusive, the Union's effort barely budges its burden and certainly doesn't carry it.

Adverse Inference Requests

The Union also would rely on adverse inferences it urges me to draw in connection with subpoenas it served on drivers John Stephens and Pam Ray. The subpoenas sought documents related to interim employment and search for employment. In its brief, the Union states:

> Respondent Local 71 requests that the Administrative Law Judge in this case draw an adverse inference that Mr. Stephens' failure to comply with the document subpoena requesting records regarding other work and referrals during the relevant period, should be deemed an admission in the General Counsel's case that Mr. Stephens was otherwise employed or had offers of comparable employment during the period.

The Union's brief also requests such an adverse inference be drawn with respect to Ray "because of avoidance of Respondent Local 71's subpoena for documents."

Before proceeding further, it may be noted that the Union's arguments could have benefitted from greater clarity in exegesis. On the one hand, if I understand the Union's brief correctly, it appears to be contending that the discriminatees did not sufficiently search for work, a matter discussed above. On the other hand, the Union appears to argue that two of the discriminatees, Stephens and Ray, were working during the backpay period.

Does the Union seek adverse inferences to prove that Stephens and Ray were not making a sufficient search for work, or to support an argument that they were employed during the backpay period? I will assume the latter. As discussed above, the discriminatees' attempts to use the hiring hall provide conclusive evidence of sufficient search for work.

Section 102.114(a) of the Board's Rules and Regulations allows parties to serve subpoenas and other papers "personally, or by registered mail, certified mail, regular mail, or

private delivery service." The Union chose to send its subpoenas to Stephens and Ray by certified mail.

A United States Postal Service record, introduced into evidence, indicates that on May 5, 2014 at 1:53 p.m., a letter carrier tried to deliver the subpoena to Stephens' home in Arden, North Carolina. Because no authorized recipient was available to sign for the certified letter, the Postal Service instead left a notice advising that he could arrange redelivery or could pick up the letter at the post office. The record indicates that Stephens did neither.

The Union sent a similar subpoena to Ray, who lives at the same address as Stephens. The Postal Service record indicates that the letter carrier tried to deliver this subpoena at the same time as the one to Stephens but, finding no one to sign the receipt, left a notice. Ray also did not pick up the letter.

The fact that neither Stephens nor Ray received the subpoena explains why they did not produce the subpoenaed documents at hearing. However, the Union argues that "Failure or refusal to claim certified mail will not be permitted to defeat the purposes of the Act. See *Da Vinci Fashions*, 286 NLRB 809, 814–816 (1987)."

The cited *Da Vinci Fashions* decision[5] reiterated the well-established principle "that 'refused' service is sufficient service under Board law." 286 NLRB at 816. However, deeming the service of the subpoenas sufficient, as a matter of law, does not address other serious questions raised by a request to draw an adverse inference.

In *Da Vinci Fashions*, a "person or persons unknown" actually went to the post office and then "affirmatively refused to accept service, thus causing the post office to physically mark the envelope 'refused' and return it to the General Counsel's Regional Office." 286 NLRB at 815. However, in the present case, the record does not indicate that either Stephens or Ray went to the post office and I conclude that they did not.

Stephens credibly testified that he did not see the receipt. Where he lives, in Arden, North Carolina, is near Ashville but, at this time, he was working in the Charlotte area. Other parts of the record leave little doubt that making a motion picture requires employees to work long hours. Obviously, the relatively brief period allotted for filming on location results in a demanding and unpredictable schedule. Therefore, I do not conclude that Stephens was trying to avoid service of the document. He was simply very busy and away from home.

Moreover, the Postal Service notice, which is in evidence, states: "If this item is unclaimed after 15 days then it will be returned to the sender." Someone receiving this notice reasonably would understand that he had 15 days to go to the post office and sign for the letter. However, 15 days after the May 5, 2014 delivery date would be May 20, 2014, which is 6 days after Stephens testified and 4 days after the hearing closed.

[5] On the "Board Decisions" page of the National Labor Relations Board's website, *Da Vinci Fashions*, 286 NLRB 809 (1987), appears under the case name *Djamshid Mahban*.

The original compliance specification in this matter issued on March 26, 2014, so the Union had ample time to prepare and serve subpoenas. After delaying as long as it did, and then choosing a method of service which afforded a 15-day pickup period, the Union is not well situated to argue that an adverse inference should be drawn because Stephens did not pick up the letter immediately.

Additionally, crediting Stephens' testimony, I find that he never received the certified mail notice. Accordingly, it would not be appropriate to draw an adverse inference.

Unlike Stephens, Ray did receive the May 5, 2014 certified mail notice. However, considering that the notice gave her 15 days to pick up the certified letter, and that the hearing concluded before this time period expired, drawing an adverse inference would not be appropriate.

In sum, for all the reasons discussed above, I deny the Union's request to draw adverse inferences. Now, I turn to the specific allegations in the Compliance Specification.

Paragraph 25 - Backpay Period

As amended at hearing,[6] the Compliance Specification, at paragraph 25, alleges the following backpay periods:

DISCRIMINATEE	START DATE	END DATE
Pam Ray	December 4, 2013	January 9, 2014
John Stephens	December 4, 2013	January 9, 2014
Joe Cook	December 6, 2013	December 20, 2013
John Reynolds	December 6, 2013	December 20, 2013
Jerry Luckey	December 10, 2013	December 18, 2013

Respondent Union's answer denies these allegations for a number of reasons. The Union's answer thereafter "restates and realleges" some of these reasons, by reference, in response to other allegations. It will suffice here to address them once.

Respondent Union's answer avers that Ray, Stephens, Cook, Reynolds, and Luckey "were not employed in the bargaining unit described in Complaint ¶ 8, above." Neither Respondent Union's answer nor its brief elaborates. The discriminatees were not employed in the bargaining unit because Respondent Union, unlawfully discriminating against them because of their nonmembership, did not place their names on the main referral list. (In the case of Luckey, the Respondent did belatedly place his name on that list but at a lower position than it should have occupied.) Obviously, a respondent may not assert as a defense that certain individuals were not employed, and therefore not entitled to a remedy, when the respondent's own unlawful acts placed them in that condition.

[6] The amendments at hearing removed the name of Layla D. Jones from the Complaint and various paragraphs of the Compliance Specification. The General Counsel no longer alleges Jones to be a discriminatee and does not seek a remedy for her.

Respondent Union's answer raises another argument so patently insubstantial that it merely wastes time. It states that the discriminatees "failed to apply directly for employment with Respondent Employer on the television pilot *The Novice*." The Respondent Union should be well aware that it had entered into a referral agreement with Respondent Employer which made the Union the *exclusive* source of drivers. Having bound the Employer to go to the hiring hall for drivers, the Union hardly is in a position to claim that the discriminatees should forfeit backpay because they did not try to circumvent this arrangement.

Respondent Union also answers that the discriminatees "were not reached for referral to the Respondent Employer on the television pilot *The Novice* under the duly-adopted provisions of Teamsters Local Union No. 71 Movie Entertainment Pipeline Policy effective August 31, 2013. . ." Presumably, the Union is referring to the policy announced earlier in August by Union President Russell. This policy required jobseekers to become members of the Union by August 30, 2013.

However, this is precisely the policy which I have found to violate the Act and which requires a remedy. It affords no defense to itself.

The Respondent Union's answer further states that even if it had referred discriminatees Ray, Cook and Reynolds, the Respondent Employer would have exercised its contractual right to reject applicants and refused to hire them. The Respondent Union's answer doesn't explain the basis for this assertion, but its brief points to the testimony of Respondent Employer's transportation coordinator, Davie Beard, who had also been transportation coordinator on another filming project earlier in the year.

Beard's testimony indicates that during this earlier project, Ray had become ill. According to Beard, he asked his "captain" to call Ray back to work "multiple times" but she did not respond to the calls. Nonetheless, Beard did not decide absolutely never to hire her again. Referring to Ray and another driver, Luckey, as "they," Beard testified: "If I had my choice of drivers that I would hire, they would not have been my first choice, but if I needed drivers and they were the only ones available that could come through, they would have been hired. . ."

Considering that Respondent Employer did not rule out the possibility of hiring Ray, and resolving any uncertainty in favor of the discriminatee, I reject Respondent Union's assertion that, in any event, Ray would not have been hired. See *Minette Mills, Inc.*, 316 NLRB 1009, 1011 (1995) ("any ambiguities, doubts, or uncertainties are resolved against. . .the wrongdoer, because an offending respondent is not allowed to profit from any uncertainty caused by its discrimination").

As to driver John Reynolds, although Respondent Union's answer asserts that the Employer would have exercised its contractual right to reject applicants and refused to hire him, it does not explain why. The Union's brief does present the mirror image of this argument, asserting that if Reynolds had been offered employment, he would have turned it down:

> Mr. Reynolds is a member of Teamsters Local 509, living in Charleston, South Carolina, and although registered on the Local 71 referral list, has never accepted a call to work under that system. [Tr. pp. 153 - 155] Given the

> testimony of Mr. Reynolds and the short duration of the work on *The Novice* production, it is a fair inference that Mr. Reynolds would not have accepted a call to work on that production in December, 2013. Respondent Local 71 submits that the record shows Mr. Reynolds to not be eligible for an award of backpay in this case.

Although the Union's brief argues "it is a fair inference" that Reynolds would have turned down an offer of employment, when the Union cross-examined Reynolds on this very question, it heard otherwise:

> Q. In this call, you would have had to have been available in Charlotte within 12 hours of the call.
> A. I could have done that.
> Q. And there'd have been no reason you'd turn that one down?
> A. No.

In light of this testimony, which I credit, I will draw no inference that Reynolds would have declined employment had it been offered. The Union has failed to establish that Reynolds would have turned down employment and, likewise, it has failed to prove that Respondent Employer would have refused to hire Reynolds had his name been on the referral list.

Respondent Union's answer also states that "Alleged discriminatees Ray, Stephens and Cook would not have been provided a referral to the Respondent Employer on the television pilot *The Novice* under the duly-adopted provisions of Teamsters Local Union No. 71 Movie Entertainment Pipeline Policy that impose a ninety (90) day period of ineligibility for referral to referral applicants who have voluntarily quit a referred job or are justly terminated by the Employer."

Presumably, Respondent Union's answer is referring to the Movie Entertainment/Pipeline Referral Policy adopted by the Union's executive board on August 9, 2013. However, the Union's answer does not identify the particular sections of this policy which it contends apply here. Such specificity would have been helpful because the Union is claiming that the policy imposes a 90-day ineligibility on drivers who "voluntarily quit a referred job." My examination of the policy did not discover any provision which related resignation to a 90-day ineligibility period. However, the policy does include the following:

> Any member walking off the job, during working hours without the knowledge or permission of the production company, will be removed from the referral list.

The referral policy also includes a section imposing a 90-day ineligibility period on someone justly terminated: "Any employee, who is justly terminated by the Employer, shall not be eligible for any work referrals for a ninety (90) day period or may be removed from the referral list, depending on the severity of the termination."

The Union's answer does not offer any detail which would explain how these provisions apply to drivers Ray, Stephens and Cook. It certainly appears clear that the Union is *not* claiming that an employer justly terminated Stephens. Other witnesses characterize Stephens as

highly qualified and the Union's brief itself describes Stephens as "a driver with high skills in the operation of industry equipment. . ."

The Union's brief also does not indicate that Stephens walked off a job. Instead, it contends that Stephens "would not have been available or eligible for referral to *The Novice* production on December 4, 2013, under the. . .Policy, because of his direct employment on the production Captive and his acceptance of referrals from other Teamsters Local Union movie referral lists to a production in Florida."

The Union's brief cites Stephens' testimony, which establishes that he worked on a movie production called "Captive" in late October 2013 and on a Disney show called "Tomorrowland" in November 2013. Stephens credibly testified that this work ended about November 20, 2013. Thus, he was available for work on *The Novice* when production began on about December 4, 2013.

If there is some other argument that Stephens' work in October and November should disqualify him from a referral in December, the Respondent Union should have presented it specifically and unambiguously. Based on my examination of the evidence, there is no basis for such argument.

The Union's answer asserts that driver Pam Ray similarly is disqualified because of being "justly terminated." The Union's brief states as follows:

> Ms. Ray has not been shown to have been eligible for hire by Respondent Employer for *The Novice* production, under Article V of the collective-bargaining agreement, because of her prior release (termination) from productions for a valid reason. [GC Exh. 3; Tr. pp. 303-308] The Movie Entertainment/Pipeline Referral Policy states that such termination makes a registrant not eligible for any work referrals for a ninety day period.

However, the evidence does not support the Union's assertion that Ray's prior employment had been terminated. Although the Union cites the testimony of Davie Beard concerning Ray's employment on the earlier Homeland production, Beard did not testify that Ray had been discharged. To the contrary, he said that Ray could not work for a while because of a medical problem and that attempts to call her back to work had been unsuccessful. Finally, he received an email from the Employer's vice president of labor relations stating that he no longer needed to call her.

A decision not to spend more time trying to contact Ray certainly is not a decision to terminate employment. Therefore, I reject the Union's argument. Moreover, Ray's absence because of a medical problem can hardly be considered walking off the job.

Additionally, to carry its burden of proof, the Respondent Union must show not only that Ray properly would have received the 90-day suspension, but also that this removal from the referral list would have made her unavailable for referral at the time the Respondent Employer was hiring. Even assuming, solely for the sake of analysis, that she properly would have received a 90-day suspension, the record does not support a finding that the removal period

would have included the time that Respondent Employer was filming *The Novice*. Therefore, I reject the Respondent Union's arguments.

The Union raises a similar argument regarding the availability of driver Joe Cook. It contends that Cook would not "have been provided a referral" because the Union's policy imposed a 90-day ineligibility period on registrants "who have voluntarily quit a referred job or are justly terminated by the Employer." (It bears repeating that the referral policy actual refers to walking off the job without permission, not to a voluntary quit.)

Transportation Coordinator Davie Beard testified that, during a production before *The Novice*, Cook had asked to quit before filming was completed, that he, Beard, denied the request because there was not time to find a replacement, but that Cook quit anyway. Cook's testimony contradicted Beard's. According to Cook, he never quit a production early without permission. He described an instance when he did leave filming early but with permission. Although I would credit Cook's testimony, for the sake of analysis, I will assume that Cook did quit, as Beard testified, and that it constituted a "walking off the job."

Nonetheless, the Respondent Union's argument must fail for the same reason it did with respect to Ray. Even if the Union properly could have suspended Cook from the referral list for 90 days, it cannot carry the burden of proving that this suspension would have made him unavailable for referral during the time period when drivers were employed on *The Novice* production.

The Union also argues that the Respondent Employer would not have hired Cook. Transportation Coordinator Davie Beard did testify that he did not want to hire Cook, but he stopped short of saying that he would not hire him. This uncertainty must be resolved in favor of Cook, the discriminatee. *Midwestern Personnel Services*, 346 NLRB 624 (2006); *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973).

The Respondent Union's brief offers another argument for denying Cook backpay. It states:

> Mr. Cook, an active member and referral list participant in Teamsters Local 528 in Atlanta, Georgia, had previously registered himself on the Local 71 list, but most of his work was in Georgia. [Tr. pp. 304 - 306] However, it is more likely, given this record that Mr. Cook would not have accepted a short-term, three-week referral in the Charlotte, NC area even if offered.

However, Cook credibly testified that he was available and looking for work from December 6 through December 20, 2013, the backpay period alleged in the Specification. Crediting this testimony, I reject Respondent's argument.

The Union's answer asserts that each of the discriminatees "was otherwise employed at the time of the call, or were otherwise engaged, so as not be available for the start time designated by Respondent Employer." However, credible evidence does not support this assertion, which I reject.

In sum, with respect to all of the discriminatees, I conclude that the Respondent Union has failed to carry its burden of proof. Based on the credited evidence, I find that the General Counsel has proven the backpay period start dates alleged in paragraph 25 of the Compliance specification.

The Compliance Specification alleges that the backpay periods for two of the discriminatees, Ray and Stephens, ended on January 9, 2014. The Union disputes this allegation, stating in its answer that "all alleged comparable drivers obtaining employment on the television pilot *The Novice* through referral under the Teamsters Local Union No. 71 Movie Entertainment/Pipeline Policy ended their service under the collective-bargaining agreement alleged in Complaint ¶ 8 no later than December 20, 2013."

During the hearing, the General Counsel called the Board's compliance officer, Jenny Dunn, to explain the formula she used and calculations she made which formed the basis for the Compliance Specification. With respect to the backpay period ending dates for Ray and Stephens, she testified as follows:

> Q. . . .Do you -- did you do an investigation on why you found comparables in January, because the evidence is that the program finished in December?
> A. I looked at the Class A drivers that were employed on the Novice, and I looked at when their payroll period -- when they began being paid by Respondent Employer and their last dates of employment with Respondent Employer. And there were two individuals, Paula Pierce and I believe his first name is Brian, I know is last name is Smallwood, who were Class A drivers on the Novice who had employment and were paid by Respondent Employer into January 2014.
> Q. And at paragraph 26(h) of the specification, you list the comparable for Mr. Stephens as Chris Braun. But Mr. Braun wasn't employed in the fourth quarter. Why would or what theory or formula did you use to substitute someone else as a comparable?
> A. I'm sorry, what -- Chris Braun?
> Q. Right.
> A. I believe with Chris Braun he indicated to me that or I understood that he had -- he had passed on work in January -- he had been contacted for work in January 2014, but had not accepted it. He had been contacted by Rick Parkinson to continue employment on the Novice in January 2014, but due to some prior engagement he was unable to take that work and passed on it.
> Q. So and then who -- are you saying that Paula Pierce was assigned to this work under the referral system?
> A. Correct.

The Union has not presented evidence sufficient to establish that the compliance officer erred and I conclude that she did not.

In disputing that the backpay period for Ray and Stephens ended in January 2014, as alleged, the Union raises one additional argument. Its answer states that any "payroll for transportation department employees earned on the television pilot *The Novice* during the first Quarter of 2014, including the periods alleged for Ray and Stephens in Compliance Specification. ¶ 25, above, was earned for 'wrap work' not subject to referral under the Teamsters Local Union No. 71 Movie Entertainment Pipeline Policy."

However, neither the phrase "wrap work" nor the word "wrap" appears in this policy, which is in evidence as General Counsel's Exhibit 5(a) and set forth in full above. Likewise, the term "wrap work" does not appear in the collective-bargaining agreement.

Specifically, the "Novice Television Pilot Agreement" was effective by its terms from December 3, 2013 "until the end of this pilot (Novice)." Its article III described the scope of the work performed by the bargaining unit. Article 3.1 defined work as driving and operating all rolling stock except "golf carts used for personal use, unless they are used to transport/haul equipment or personnel" but made no reference to "wrap work."

Additionally, the term "wrap work" does not appear anywhere in the hearing transcript. The words "we wrapped" did appear twice in the record. Thus, at one point in his testimony, John Stephens said "We wrapped on that Friday." Likewise, Davie Beard testified, "We wrapped -- we had a 13-day shoot." The word "wrap," in this context, clearly means "conclude." Therefore, it would be reasonable to infer that "wrap work" has something to do with the conclusion of filming.

However, that inference does not reveal how "wrap work" might differ from the day-to-day work of drivers during filming of a movie. It is not obvious how driving a truck on the last day would be any less bargaining unit work than doing so on any other day.

Because the term "wrap work" does not appear in the Union's referral policy, the collective-bargaining agreement or in witness testimony, and because the Union's brief does not define it, I am at a disadvantage, and reluctant to agree with that which I do not understand. Perhaps the Union's theory would have been more persuasive had it been comprehensible, or at least dropped some hints. In the absence of evidence describing "wrap work" and establishing there was an agreement or practice that it would not be performed by those referred through the hiring hall, I must reject the Union's argument.

In sum, I find that the General Counsel has proven that the backpay periods of the various discriminatees begin and end on the dates alleged in Complaint paragraph 25, as amended.

Paragraph 26

Paragraph 26(a) of the Compliance Specification alleges that an appropriate measure of the gross backpay due the discriminatees is based on the quarterly earnings of comparable drivers. Respondent's answer stated that it "denies the allegations of ¶ 26(a) of the Compliance

Specification for the following reasons: (i) IBT Local 71 restates and realleges the reasons set forth in Answer ¶¶25(i),(ii),(iii),(iv),(v),(vi),(vii),(viii),(ix) and (x), above." Respondent did not otherwise answer the allegations in Specification paragraph 26.

For reasons discussed above, I rejected these arguments when raised in connection with the allegations in Specification paragraph 25, and they are no more persuasive here. Moreover, they do not squarely address the issue raised by paragraph 26(a), namely, whether or not an appropriate measure of the gross backpay due the discriminatees is based on the quarterly earnings of comparable drivers.

The Board's Rules and Regulations require more than an oblique response to allegations in a compliance specification. Section 102.56(b) of the Board's Rules states, in part, as follows:

> As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

Very roughly, the Board's regulation can be paraphrased as telling a respondent, "if you think we're doing this calculation wrong, then show us how to do it right." If the respondent's answer fails to explain how the specification erred and how it can be corrected, its denial isn't worth much. Indeed, in some instances, an unexplained denial can result in the allegation being deemed admitted. Thus, Section 102.56(c) of the Board's Rules states, in part, as follows:

> If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The Union's response to Specification paragraph 26(a) does not satisfy the Board's pleading requirements. To discuss how the Union's answer falls short, I begin by taking a close look at the allegation itself to determine exactly what the Respondent must admit or deny.

Specification paragraph 26(a) calls on Respondent to agree or disagree with a rather simple and straightforward allegation, namely, whether "an appropriate measure of the gross backpay due the discriminatees is based on the quarterly earnings of comparable drivers." It does not allege that any particular employee is an appropriate "comparable driver" and, indeed, doesn't name any driver. (That issue, about which driver should be used, comes later, in Specification paragraph 26(h).)

All that Respondent Union has to do to answer Specification paragraph 26(a) is to admit or deny that it is appropriate to calculate backpay by reference to the quarterly earnings of comparable drivers and, if the Union denies that this way is appropriate, to explain why and describe the method it does consider appropriate. However, Respondent Union's Answer does not describe any alternative to the premise that the quarterly earnings of comparable drivers appropriately may be used to calculate backpay.

A compliance hearing typically comes well after the determination of liability and the hearing upon which that determination of liability was based. In the compliance proceeding a respondent, already having been found guilty of committing unfair labor practices, may not relitigate the issue of liability.

That same principle applies here, even though the liability and compliance issues were litigated in one hearing. Already in this decision, I have reached conclusions about Respondent Union's liability and will not revisit those issues now.

Respondent Union's Answer to Specification paragraph 26(a) largely focuses on issues about liability and neglects to explain how it would be inappropriate to use the quarterly earnings of comparable drivers as the basis for the backpay calculations. It also does not offer an alternative to the premise described in Specification paragraph 26(a). Accordingly, in accordance with Section 102.56(c) of the Board's Rules, I conclude that the government has proven the allegations raised in Specification paragraph 26(a).

Paragraph 26(b) of the Compliance Specification, as initially issued, concerned the calculation of backpay for driver Layla Jones. However, at the close of the hearing, the General Counsel moved to amend the Complaint to delete the allegations that the Respondents unlawfully discriminated against Jones. My approval of those amendments removed Jones from the ranks of the discriminatees and had the effect of deleting the allegations in paragraph 26(b).

Specification paragraph 26(c) alleges that Respondent Employer selected drivers for work based on the order that they appeared on the movie referral list provided by Respondent Union, which listed drivers in the order that they registered with Respondent Union's hiring hall for work (hiring hall user seniority). Respondent Union's Answer restated and realleged its answer to Specification paragraph 25, which I deem insufficient for the reasons stated above. The Union further answered Specification paragraph 26(c) as follows:

> (ii) Respondent Employer selected drivers to work on the television pilot The Novice under the terms of the collective-bargaining agreement alleged in Complaint ¶ 8, above, *without such drivers being selected in the order that they appeared* under the Teamsters Local Union No. 71 Movie Entertainment/Pipeline Policy.
>
> (iii) The relevant provisions of the Teamsters Local Union No. 71 Movie Entertainment/Pipeline Policy, effective between August 31, 2013 and January 1, 2014 which established an "A" List and a "B" List, state for each list: "The Union will refer individuals, on its referral list, to the Employer as follows: The Union will maintain a "Employee Referral List" arranged in a seniority order, by the dates the individual registered on the

> list, and the captain will call the individuals in the order they appear on the list."

(Italics added.) The portion of the Union's answer which I italicized, above, effectively denies that drivers were selected based on the order of names on the list. However, the "captain" who kept the list and made referrals from it, Rick Reynolds Parkinson, testified "I went down the list starting at number one." Based on my observations of the witnesses, I believe Parkinson was a reliable witness, and I credit him.

However, it is clear from Parkinson's testimony and other portions of the record that the referral process involved more than simply calling the next name on the list. Union President Russell had marked the names of drivers who were not to be called. Presumably, Russell did so after learning from the transportation coordinator that the Employer would not hire these individuals.

Additionally, only "Class A" drivers were qualified and licensed to operate all types of vehicles, which meant that "Class B" and "Class C" drivers would not be eligible for some referrals. Moreover, some drivers, when called, declined the employment.

However, with those qualifications, I find that the Employer did select drivers based on the order their names appeared on the list, as alleged in Specification paragraph 26(c).

Specification paragraph 26(d) alleges that the discriminatees had certain seniority dates. Although Respondent Union's answer stated "IBT Local 71 denies the allegations of ¶ 26(d)," it then admitted that discriminatees Pam Ray, John Stephens, Joe Cook, and John Reynolds possessed the seniority dates alleged in the Specification. Respondent did disagree concerning the seniority date of driver Jerry Luckey, stating that Luckey's seniority date was September 4, 2013. The Specification alleged that Luckey's seniority date was January 24, 2012.

As discussed above, Luckey decided to join Local 71 but did not do so by the August 30, 2013 deadline which Union President Russell had set. He joined about 5 days later. The Union assigned Luckey a seniority date corresponding to when he joined.

However, as I have found above, the Union's action discriminated against Luckey because of his nonmembership, which violated the law. Therefore, I find that Luckey's seniority date is January 24, 2012. In sum, I conclude that the General Counsel has proven all the allegations raised by Specification paragraph 26(d).

Specification paragraph 26(e) alleges that Respondent Employer's practice was to select drivers for work based on their driver classification. Accordingly, Respondent Employer hired Class "A" drivers to fill Class "A" driver positions and did not employ Class "A" drivers for other work that they may have otherwise been qualified to perform, such as Class "C" driver positions.

Denying this allegation, the Union's answer stated "Respondent Employer practices on the television pilot *The Novice* allowed assignment of Class 'A' Drivers for other work that such drivers may have otherwise been qualified to perform, such as Class "C" driver positions."

To aver that practices *allowed* assignment of Class A drivers to other positions isn't the same as claiming that such assignments actually occurred. The Union, which operated the hiring hall, certainly would have known if a Class A driver had been assigned to perform work which someone in a lower classification could do. Presumably, the Union would have pointed to an example if such an assignment actually had occurred.

Moreover, the "captain" who did the assigning, Parkinson, testified as follows:

> Q. Isn't it true that Class A drivers do, in fact, drive vans as well?
> A. Yes, sir.
> Q. A Class A driver when called can accept any position that you offer them?
> A. Okay.
> Q. Can you give a couple of examples on either The Novice or in your experiences wherein the Class A driver is used for Class C work?
> A. I don't believe on The Novice -- we had that happen about a couple of years ago. We had several Class A drivers accept van driving jobs on a movie call, Blood Done Sign My Name. I wasn't the captain. I didn't make the calls, but I do recall some of our top-paying guys were driving vans.

Based on Parkinson's testimony—"I don't believe [it happened] on The Novice"—and noting that it would not be efficient to use "our top-paying guys" to drive vans, I conclude that such an assignment did not occur. Therefore, I find that the General Counsel has proven the allegations raised by Specification paragraph 26(e).

Specification paragraph 26(f) alleges, in pertinent part, as follows: "Exhibit A contains a listing of the discriminatees Ray, Stephens, Cook, Reynolds, and Luckey and the Class "A" drivers who were hired in lieu of the discriminatees and are being used as comparable employees for backpay purposes. These individuals are listed in the order of their hiring hall user seniority date, which is set forth next to their name." (Footnote omitted.)

Respondent denied the allegation. Its answer repeated: "IBT Local 71 restates and realleges the reasons set forth in Answer ¶¶25(i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix) and (x), above."

Further, the Union's answer stated "IBT Local 71 denies any discrimination and denies any unlawful omission with regard to alleged discriminatees Ray, Stephens, Cook, Reynolds, and Luckey, and denies that any other person registered with the Teamsters Local Union No. 71 Movie Entertainment/Pipeline Policy for referral on the television pilot *The Novice* is a 'potential discriminatee.'"

In essence, the Union's answer contests liability, an issue already decided. I conclude that the General Counsel has proven the allegations in Specification paragraph 26(f).

Specification paragraph 26(g) pertains to the allegations which the General Counsel withdrew by amendment at hearing.

As discussed above, Specification paragraph 26(a) had alleged that it was appropriate to base backpay calculations on the quarterly earnings of comparable drivers, but did not identify them. Specification paragraph 26(h) names the comparable drivers whose quarterly earnings would be used. Thus, this portion of the Specification gave the Union the opportunity to dispute that the named individuals were appropriate for this purpose. However, the Union did not do so.

Although the Union's answer denied the allegations, the reasons it gave did not address the issue presented by the Specification paragraph, but instead reverted to contesting liability, an issue already decided and not to be revisited here. The answer only explained the denial by stating: "IBT Local 71 restates and realleges the reasons set forth in Answer ¶¶25(i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix) and (x), and in Answer ¶¶ 26(a), (b), (c), (d), (e), (f) and (g), including roman numeral subparts, above."

The answer thus falls short of the requirements imposed by Section 102.56 of the Board's Rules. I find that the General Counsel has proven the allegations raised in Specification paragraph 26(h).

Paragraph 27

Specification paragraph 27(a) and Specification Exhibits C, D, E, F, G and H[7] set forth and allege the backpay calculations for each discriminatee. Each of these exhibits pertains to the backpay due a particular discriminatee. Specification paragraph 27(b) explains that in each of these exhibits, Column C shows total gross backpay "and is based on the pay earned by the comparable drivers listed in Paragraph 26(h), for the pay period listed in Column B, falling within the year and calendar quarter listed in Column A."

The Union's answer denied the allegations in Specification paragraph 27(a). It stated: "IBT Local 71 restates and realleges the reasons set forth in Answer ¶¶25(i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix) and (x), and in Answer ¶¶ 26(a), (b), (c), (d), (e), (f) and (g), including roman numeral subparts, above."

The Union denied "the total gross backpay calculated in Exhibits C, D, E, F, G and H for the reasons set out in Answer ¶29(a), including subparts, below." The answer to paragraph 29(a) included essentially the same "restates and realleges" language quoted above, but also restating and realleging its denials of the allegations in Specification paragraph 27(a) and 27(b).

The Union's answer to Specification paragraph 29(a) further explained the denial by stating that the discriminatees "failed to search for comparable interim employment during the production period of the television pilot *The Novice*." For the reasons discussed above, I reject this argument.

Further, the Union's answer to Specification paragraph 29(a) states that the discriminatees "failed to accept and refused available referrals to comparable film and television

[7] Specification Exhibit H alleges the backpay due Layla Jones. As noted above, by amendment at hearing, the General Counsel has withdrawn the allegations pertaining to Jones and she is not entitled to backpay.

production driver work from other industry referral systems, including, but not limited to the Industry Experience Roster, on which they were registered during the production period of the television pilot *The Novice*."

The Union has not proven that any of the discriminatees failed to accept work from another source. The record does establish that one of the discriminatees, John Stephens, was listed on an "industry experience roster" and it appears that this roster is kept by a Local Union in California. However, no credible evidence indicates that any discriminatee learned about but refused employment from this or any other referral source.

The Union's Answer also asserts that each discriminatee's interim earnings (set forth in Column D on each of the exhibits) "should be equal to or greater" than the gross backpay for that person. "Because of willful refusal of the alleged discriminatees to seek, accept or retain available interim employment as a driver in the film and television production industry during the period of the television pilot The Novice, all backpay liability to Respondents is tolled."

The Union bears the burden of proving a refusal "to seek, accept or retain available interim employment" but has not carried this burden. Certainly, it argued that an absence of interim expenses proved a lack of job search but that argument is hardly persuasive considering how many people look for, find and apply for employment online. No credible evidence supports the Union's claim that the discriminatees either failed to look for or refused interim employment.

The Union's answer denied Specification paragraph 27(b) but only gave the following explanation for its denial: "IBT Local 71 restates and realleges the reasons set forth in Answer ¶¶25(i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix) and (x), and in Answer ¶¶ 26(a), (b), (c), (d), (e), (f) and (g), including roman numeral subparts, and in Answer ¶ 27(a), including subparts, above." For reasons discussed above, I reject the Union's arguments. Further, I find that the General Counsel has proven the allegations raised by Specification paragraphs 27(a) and 27(b).

Paragraph 28

Specification paragraph 28 alleges that "Net backpay is the difference between each discriminatee's quarterly gross backpay and his or her quarterly interim earnings (Columns C and D) and is contained in Column E."

This allegation simply defines a simple term in a simple way. It only requires a simple answer. Perhaps a philosopher or law professor could make it more complicated, but it appears to present only two propositions for agreement or disagreement: (1) Is net backpay equal to gross backpay minus interim earnings? (2) Should the calculation be done on a quarterly basis?

The proposition that gross backpay = net backpay - interim earnings can hardly be considered a shocking innovation in labor law. Similarly, calculating by calendar quarter will not take practitioners by surprise.

If the Respondent Union did disagree with either principle, it only had to explain why. However, in denying Specification paragraph 28, the Union's answer did not address either

matter. Instead, it stated that the Union denied the allegation "for the following reasons" and then repeated the old "boilerplate," slightly tweaked: "IBT Local 71 restates and realleges the reasons set forth in Answer ¶¶25 (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix) and (x), and in Answer ¶¶ 26(a), (b), (c), (d), (e), (f) and (g), including roman numeral subparts, and in Answer ¶¶ 27(a), (b), including subparts, above."

However, use of this weathered "boilerplate" does not make the Union's answer ironclad. To the contrary, I conclude that the Union's answer to Specification paragraph 28 does not satisfy the requirements of Section 102.56. Further, I conclude that the government has proven the allegations raised in Specification paragraph 28.

Paragraph 29

Specification paragraph 29(a) alleges that discriminatees "are entitled to be reimbursed by Respondents for search for work expenses they incurred as a result of searching for interim employment."

This allegation simply states a well settled principle of labor law. The Respondent Union's answer denies the allegation but then, instead of explaining its disagreement with the principle, proceeds with irrelevant claims that the discriminatees failed to accept offers of interim work. As discussed above, no credible evidence supports such assertions, but even if there had been some arguable basis for the claims, they had no bearing on the issue raised by Specification paragraph 29(a), which only concerned entitlement to search-for-work expenses.

In sum, I conclude that the Union's answer to Specification paragraph 29(a) is unresponsive and fails to satisfy the requirements of Section 102.56 of the Board's Rules. Further, I conclude that the General Counsel has proven the allegations in Specification paragraph 29.

Specification paragraph 29(b) states that the discriminatees do not, in fact, claim any such work-search expenses. The Union's answer admits this allegation "for the following reasons," and then repeats the same "boilerplate" discussed above.

Specification paragraph 29(c) states: "Although based on the investigation thus far, it does not appear that the discriminatees had any interim earnings, in the event that the discriminatees had any interim earnings, the discriminatees are entitled to be reimbursed by Respondents for interim employment expenses they incurred as a result of their interim employment."

The Union's answer denied this allegation. Its sole explanation consisted of the same "boilerplate" it had used to explain its admission of Specification paragraph 29(b). However, whether or not the discriminatees had interim earnings is not a matter "within the knowledge" of Respondent, so, under Section 102.56(b) of the Board's Rules, a general denial does suffice.

The record establishes that driver Jerry Lucky earned $374.02 during the backpay period by driving a bus for a church school. The Board's compliance officer did not allege this amount to be interim earnings because of the circumstances: For a considerable time, Luckey had

worked part time driving the bus for the church school. He and this employer had an understanding that if Luckey should receive a referral to work on a motion picture project, he could take an absence and then return to the bus driving job after the project ended.

At hearing, the compliance officer testified that she believed Luckey's bus driving employment fell into the category of "moonlighting" and therefore did not constitute interim earnings for purposes of backpay calculation. However, she also said that she would check with the Board's Regional Office management to be sure of the Region's position on this issue.

The General Counsel's posthearing brief makes clear that the government continues to take the position that earnings from Luckey's bus driving job are not "interim earnings" for backpay purposes. Thus, the brief states:

> In this regard, the Board has long held that where a discriminatee held a second job prior to the unlawful action, and continued to hold the second job through the backpay period, earnings from the second job are not deductible. See *Acme Mattress Co.*, 97 NLRB 1439, 1443 (1952); *U.S. Telefactors Corp*, 300 NLRB 720, 722 (1990). This principle applies even if the supplemental employment is not continuous or is with different employers. See Regional *Import & Export Trucking Co.*, 318 NLRB 816 Fn.9 (1995) In this instance, Respondents failed to provide any evidence that Luckey's hours of supplemental work increased during the backpay period, so Respondents could not argue that any earnings from increased hours of work should be treated as deductible interim earnings. *Golay Co.*, 184 NLRB 241, 245 (1970).

In agreement with the General Counsel, I conclude that Luckey's earnings from driving the church school bus should not count as "interim earnings" which reduce backpay. See *U.S. Telefactors Corp.*, 300 NLRB 720, 722 (1990); *Cable Car Charters*, 336 NLRB 927, 933 (2001).

Additionally, I conclude that the General Counsel has proven the allegations raised in Specification paragraph 29(c).

Paragraph 30

Specification paragraph 30(a) alleges that pursuant to article VI, Welfare and Pension Contributions, Section 6.1 of the agreement between Respondent Employer and Respondent Union, bargaining unit employees are entitled to have welfare fund contributions remitted by Respondent Employer on their behalf to the Flex Plan Welfare Fund at a daily rate of $42.50. Respondent Union has admitted this allegation and I so find.

Specification paragraph 30(b) alleges that an appropriate measure of the gross backpay due the Flex Plan Welfare Fund on behalf of each discriminatee is based on the number of days worked by each respective discriminatee's comparable driver multiplied by the contractual daily welfare fund contribution rate. It further states that column H in each of the exhibits summarizing the individual backpay computations contains the gross backpay calculations for

the welfare fund contributions to be remitted to the Flex Plan Welfare Fund on behalf of each named discriminatee.

Respondent Union's answer denies these allegations. However, the only explanation it provides is the "boilerplate" which "restates and realleges" its answers to previous allegations in the Specification. Respondent Union, having entered into the contract which created the obligation to make contributions to the Flex Plan Welfare Fund, certainly has knowledge about this matter. Therefore, Section 102.56 of the Board's Rules required it to respond with more than a general denial.

Accordingly, the Union had an obligation to set forth an alternative appropriate measure of the gross backpay due the Flex Plan Welfare Fund to support its denial that the measure alleged by the Specification was not appropriate. Because if failed to do so, I find that the General Counsel has proven the allegations in Specification paragraph 30(b).

Specification paragraph 30(c) alleges, in pertinent part, that for weeks in which the number of days worked by the comparable driver is reflected in Respondent Employer's payroll records, for example, where 6th day or 7th day pay was earned, the total amount owed is listed for the welfare contribution. The Respondent Union's answer denied this allegation but supported its denial only with the "boilerplate" described above.

It is possible, but not certain from the present record, that the Respondent Union would have had access to or knowledge about employers' relevant payroll records at the time the Union filed its answer. Therefore, I do not conclude that Section 102.56(b) required the Union to respond with more than a general denial.

Compliance Officer Dunn testified that in performing the relevant calculations, she reviewed the signed agreement between the Union and the Employer and also the Respondent Employer's payroll records. No credible evidence casts doubt on the accuracy of the calculations. Therefore, I find that the General Counsel has proven the allegations raised in Specification paragraph 30(c).

Paragraph 31

Specification paragraph 31(a) alleges that pursuant to article VI, Welfare and Pension Contributions, Section 6.2 of the agreement between Respondent Employer and Respondent Union, unit employees are entitled to have pension fund contributions remitted by Respondent Employer on their behalf to the Flex Plan Pension Fund at a daily rate of $42.50. The Union's answer has admitted this allegation and I so find.

Specification paragraph 31(b) alleges that an appropriate measure of the gross backpay due the Flex Plan Pension Fund on behalf of each discriminatee is based on the number of days worked by each respective discriminatee's comparable driver multiplied by the contractual daily pension fund contribution rate. It further states, referring to the Specification's exhibits which summarize the individual backpay computations, that Column I of each exhibit contains the gross backpay calculations for the pension fund contributions to be remitted to the Flex Plan Pension Fund on behalf of each named discriminatee.

The Respondent Union's answer denied this allegation, but supported the denial only with "boilerplate," similar to that described above, which "restated and realleged" the Union's answers to previous allegations in the Specification. These responses do not pertain to the allegation raised by paragraph 31(b), which concerns the appropriate measure of the gross backpay due the Flex Plan Pension Fund.

Based on the entire record, and in the absence of any evidence which would call into question the appropriateness of the measure alleged and used in the Specification, I find that the government has proven the allegations raised in Specification paragraph 31(b).

Specification paragraph 31(c) alleges, in pertinent part, that for weeks in which the number of days worked by the comparable driver is reflected in Respondent Employer's payroll records, for example, where 6th day or 7th day pay was earned, the total amount owed is listed for the pension contribution. The Union's answer denied this allegation, but supported this denial only with "boilerplate" which restated and realleged its answers to previous paragraphs.

For reasons similar to those discussed above in connection with Specification paragraph 30(c), I conclude that the General Counsel has proven the allegations raised by Specification paragraph 31(c).

Paragraph 32

Specification paragraph 32(a) alleges, in pertinent part, that the total net backpay due Ray, Stephens, Cook, Reynolds, and Luckey, and the total amount of welfare and pension fund contributions to be remitted on their behalf, "jointly and severally by Respondents," is the sum of the calendar quarter amounts of backpay due them. It further alleged, in apparent reference to the Specification's exhibits summarizing the individual backpay calculations, that these totals were set forth at the bottom of each respective column on the line marked "Grand Total."

The Respondent Union's answer denied this allegation, but explained the denial only by restating and realleging its answers to allegations appearing earlier in the Specification.

Because I have concluded, for reasons discussed above, that the Respondent Employer did not commit any unfair labor practices, I do not find the Respondents "jointly and severally liable." However, based on the entire record and in the absence of credible evidence to the contrary, I conclude that the government has proven that the discriminatees are entitled to the total welfare and pension fund contributions alleged in Specification paragraph 32(a) and the Specification's exhibits. The Respondent Union bears sole responsibility for making the discriminatees whole, with interest, for such amounts.

Specification paragraph 32(b) alleges that "As a labor organization cannot deduct or withhold Federal, state or local income taxes except where that labor organization is the discriminatee's actual employer, it is appropriate that Respondent Employer deduct income and FICA taxes from its share of the back-pay award sufficient to cover the entire backpay award, including paying the FICA tax on Respondent Union's share of the backpay award, and remit such amounts to the appropriate Federal, state and local revenue agencies. Accordingly, it is

appropriate to compensate for the additional contributions owed by Respondent Employer by adjusting the respective shares of total net backpay owed by Respondent Employer and Respondent Union."

The Union's answer denied this allegation, but supported this denial only by restating and realleging its answers to previous allegations in the Specification.

Because I have concluded that the Respondent Employer did not commit any unfair labor practices and is not liable, I further conclude that the General Counsel has not proven the allegations raised in Specification paragraph 32(b). Rather, I find that the Respondent Union bears sole responsibility for making the discriminatees whole, including the payment of federal, state and local taxes.

Specification paragraph 32(c) alleges, in pertinent part, that the respective shares of the total net backpay due Ray, Stephens, Cook, Reynolds, and Luckey by Respondent Employer and Respondent Union are set forth in Exhibit I. The Union's answer denied this allegation, but explained its denial only by restating and realleging its answers to previous Specification allegations.

Because I have concluded that Respondent Employer did not commit any unfair labor practices and is not liable, I also conclude that the Respondent Union alone bears the obligations described in Specification paragraph 32(c) and the Specification's Exhibit I. Based on the record and in the absence of contrary evidence, I further conclude that the monetary amounts alleged are correct and that Respondent Union must make payments of these amounts, with interest.

Specification paragraph 32(d) alleges, in pertinent part, that the respective shares of the welfare and pension contributions due on behalf of Ray, Stephens, Cook, Reynolds, and Luckey by Respondent Employer and Respondent Union are set forth in the Specification's Exhibit J. The Union's answer denied this allegation but supported the denial only by restating and realleging its previous answers.

Because I have concluded that the Respondent Employer did not commit any unfair labor practices and is not liable, I further conclude that the Respondent Union alone must make the discriminatees whole by paying, with interest, the amounts set forth in the Specification's Exhibit J. Based on the record and in the absence of contrary evidence, I conclude that the government has proven that these amounts are correct as alleged.

Specification paragraph 32(e) alleges that in the event that either Respondent Employer or the Respondent Union are unable to pay all or any portion of their respective share of the backpay, each will continue to be liable for the total amount of any unpaid backpay which is due to the discriminatees. The Respondent Union's answer denied this allegation.

Inasmuch as I have concluded that the Respondent Employer committed no unfair labor practices and is not liable, I further conclude that the General Counsel has not proven the allegations raised by Specification paragraph 32(e).

Paragraph 33

Specification paragraph 33 alleges that in accordance with *Latino Express, Inc.*, 359 NLRB No. 44 (2012), discriminatees due backpay from Respondents are entitled to be compensated for the adverse tax consequences of receiving the lump-sum backpay for a period over 1 year. It further states: "If not for the unfair labor practice committed by Respondents, the backpay award for the discriminatees would have been paid over more than 1 year rather than paid in the year Respondents make final payment in this case. The backpay for this case should have been earned in 2013 and 2014 rather than exclusively in 2014." (Footnote omitted.)

Respondent Union's answer denied this allegation but supported the denial only by restating and realleging its answers to previous allegations.

In accordance with the cited *Latino Express, Inc.*, above, I conclude that the General Counsel has established that the discriminatees are entitled to be compensated for the adverse tax consequences described. Further, the record establishes, and I find, that the backpay should have been earned in 2013 and 2014, and attributed to those respective years for tax purposes, in a manner consistent with the earnings of the comparable drivers, as alleged in Specification paragraph 26(h).

Paragraph 34

Specification paragraph 34 alleges that, to ascertain what the appropriate excess tax award should be, the amounts of federal and state taxes need to be determined for the backpay as if the monies were paid when they were earned throughout the backpay period, as described in Specification paragraphs 35 and 36. It further alleges that the amount of federal and state taxes needed to be calculated "for the lump sum payment if the payment was made this year, as described below in paragraph 37. The excess tax liability was calculated as the difference between these two amounts."

Again, the Respondent Union's answer provided a general denial followed only by restating and realleging answers to previous allegations. The Union's answer did not address the specific principles which Specification paragraph 34 set forth.

Specification paragraph 34 essentially alleged legal principles. If the Union disagreed with these principles, their premises or application, it could have and should have explained its disagreement. I conclude that the General Counsel has proven the allegations raised by Specification paragraph 34.

Paragraph 35

Specification paragraph 35 alleges that the amount of Taxable Income for each year was based on the Specification's calculations for backpay for 2013 and 2014 and summarized in the Specification's Exhibit K. Paragraph 35 further stated that "using this Taxable Income for the various years, federal and state taxes were calculated using the federal and state tax rates for the

appropriate years." (Footnote omitted.) Additionally, Paragraph 35 stated that the computations were based on the discriminatees filing taxes as single individuals (rather than married).

The Respondent Union's answer denied these allegations. Again, the answer restated and realleged the Union's answers to previous allegations. It also denied "that the tax records of the alleged discriminatees will show a 'Single' tax filing status."

This last denial particularly concerns me because it might place in issue whether each of the discriminatees claimed, or properly could have claimed, tax status as a single person. The record includes little, if any, evidence concerning this issue.

Strictly speaking, Specification paragraph 35 did not allege that each of the discriminatees was single or filed a tax return claiming single status, but only alleged that the backpay computations were based on tax rates applied to an individual who was single. It thus did not place in issue either the actual marital status of each discriminatee or the marital status claimed by the discriminatee on a tax return.

Nonetheless, I do not doubt that the Respondent Union was entitled to challenge a computation by averring in its answer, for example, that the calculation incorrectly used the tax rate for a single person when the discriminatee was married. However, if the Union were to make such a challenge, then it would have to describe specifically in its answer what the correct computation would be. Section 102.56(b) of the Board's rules requires a respondent making such a challenge not only to set forth in detail the respondent's position regarding the applicable premises, but also to furnish "the appropriate supporting figures."

The Respondent Union did not do so in its answer. Therefore, I conclude that it has not placed in issue the marital status claimed by the various discriminatees on their tax returns.

In other respects, consistent with the record and in the absence of contrary evidence, I conclude that the government has proven the allegations raised by Specification paragraph 35.

Paragraph 36

Specification paragraph 36 alleges the amount of federal and state tax which each of the discriminatees owed for 2013 and for 2014. The Respondent Union's answer denied these allegations but supported this denial only by restating and realleging its answers to previous allegations.

In effect, Specification paragraph 36 alleges the results of the calculations performed using information on the amount of backpay due to each discriminatee and the tax information described in Specification paragraph 35. Because the Specification itself sets forth this information, the Respondent Union could have used it to perform its own tax calculations to determine if the outcomes matched those alleged.

If the results of such computations diverged from the results alleged in Specification paragraph 36, the Union's answer could have challenged them by describing its premises and setting forth the appropriate supporting figures, as required by Section 102.56(b) of the Board's

Rules. However, the Union's answer does not include such information. Accordingly, I conclude that the government has proven the allegations raised by Specification paragraph 36.

Paragraph 37

Specification paragraph 37 states, in pertinent part, as follows:

> The total amount of the lump sum award that is subject to this excess tax award is set forth in Exhibit M. The total of this amount is as follows for each discriminatee:

DISCRIMINATEE	LUMP SUM	DISCRIMINATEE	LUMP SUM
Pam Ray	$6,838.00	John Reynolds	$7,743.55
John Stephens	$8,825.76	Jerry Luckey	$4,219.37
Joe Cook	$7,087.22		

. . .

> The lump sum amount is based on the backpay calculations described in this specification. The amount of taxes owed in 2014 is based on the current federal and state tax rates and on the fact that the discriminatees will be filing taxes in the status set forth opposite their names. . .

DISCRIMINATEE	STATUS	DISCRIMINATEE	STATUS
Pam Ray	Single	John Reynolds	Single
John Stephens	Single	Jerry Luckey	Single
Joe Cook	Single		

> The amount of taxes owed on the lump sum is shown in Exhibit n. The total of these amounts are as follows for each discriminatee:

DISCRIMINATEE	FEDERAL TAXES	STATE TAXES
Pam Ray	$530.00	$366.00
John Stephens	$764.00	$529.00
Joe Cook	$709.00	$490.00
John Reynolds	$774.00	$536.00
Jerry Luckey	$422.00	$292.00

(Footnotes omitted)

The Respondent Union's answer denied these allegations, but supported the denial only by restating and realleging some of its answers to previous allegations. It did not provide the results of any alternative calculations, nor did it furnish either an explanation of premises or supporting figures, as required by Section 102.56(c) of the Board's Rules.

Accordingly, I conclude that the General Counsel has proven the allegations raised in Specification paragraph 37.

Paragraph 38

Specification paragraph 38 states, in pertinent part, as follows:

> The adverse tax consequence is the difference between the taxes on the lump sum being paid in 2014, in the amounts for each discriminatee listed below:

DISCRIMINATEE	FEDERAL TAXES	STATE TAXES
Pam Ray	$530.00	$366.00
John Stephens	$764.00	$529.00
Joe Cook	$709.00	$490.00
John Reynolds	$774.00	$536.00
Jerry Luckey	$422.00	$292.00

> and the amount of taxes that would have been charged if these sums were paid when the backpay was earned in 2013 and 2014, as listed for each discriminatee below:

DISCRIMINATEE	FEDERAL TAXES	STATE TAXES
Pam Ray	$530.00	$366.00
John Stephens	$764.00	$529.00
Joe Cook	$709.00	$490.00
John Reynolds	$774.00	$536.00
Jerry Luckey	$422.00	$292.00

. . .

> Thus, the excess tax liability for each discriminatee is as follows:

DISCRIMINATEE	FEDERAL TAXES	STATE TAXES
Pam Ray	$0	$0
John Stephens	$0	$0
Joe Cook	$0	$0
John Reynolds	$0	$0
Jerry Luckey	$0	$0

The Respondent Union's answer denied these allegations, but supported the denial only by restating and realleging its answers to previous allegations. For the reasons stated above, I conclude that the Union's answer does not satisfy the requirements of Section 102.56(b) and that the allegations may be deemed admitted pursuant to Section 102.56(c) of the Board's Rules.

In sum, I conclude that the government has proven all allegations raised by Specification paragraph 38.

Paragraph 39

Specification paragraph 39 stated, in part, as follows:

> The excess tax liability payment that is to be made to the discriminatees is also taxable income and causes additional tax liabilities. Exhibit O also includes a calculation for these supplemental taxes. This amount is called the incremental tax liability. The incremental tax includes all of the taxes that the discriminatees will owe on the excess tax payment. This incremental tax is calculated using the federal tax rate used for calculating taxes for the backpay award and that average state tax rate for 2014.

Specification paragraph 39 further alleged that the incremental tax liability of each of the discriminatees was zero.

The Respondent Union's answer denied these allegations but again supported the denial only by restating and realleging its answers to previous allegations. Therefore, for the reasons stated above with respect to Specification paragraph 38, I conclude that the General Counsel has proven the allegations in Specification paragraph 39.

Paragraph 40

Specification paragraph 40 alleges that "Total Excess Taxes" is the total tax consequence for the discriminatees receiving a lump-sum award covering a backpay period longer than 1 year. It further alleges that the Total Excess Taxes for each of the discriminatees equals zero.

The Respondent Union's answer denied these allegations but again supported the denial only by restating and realleging its answers to previous allegations. For the reasons stated above with respect to Specification paragraph 38, I conclude that the government has proven the allegations in Specification paragraph 40.

Paragraph 41

Specification paragraph 41 summarizes all of the calculations in the Specification and its exhibits and alleges that the "joint and several obligation of the Respondents" would be satisfied by payment to the discriminatees of specified amounts "plus interest accrued to the date of payment and excess tax liability as described above in paragraphs 33 through 40" (footnote omitted) minus the withholding tax from the backpay as required by Federal and State laws. The

amounts, as amended by the General Counsel at the hearing, are as follows:

EMPLOYEE	BACKPAY	WELFARE	PENSION	EXCESS LIABILITY TAX
Pam Ray	$6,838.21	$807.50	$807.50	$0
John Stephens	$8,825.76	$722.50	$722.50	$0
Joe Cook	$7,087.22	$637.50	$637.50	$0
John Reynolds	$7,743.55	$637.50	$637.50	$0
Jerry Luckey	$4,219.37	$425.00	$425.00	$0
Grand Total	**$34,714.11**	**$3,230.00**	**$3,230.00**	**$0**

The Respondent Union's answer denied these allegations but, again, supported the denial only by restating and realleging its answers to previous allegations. For the reasons stated above, I conclude that Respondent Union's answer does not satisfy the requirements of Section 102.56(b) of the Board's Rules, and deem these allegations admitted pursuant to Section 102.56(c).

Further, I conclude that the General Counsel has proven all allegations raised by Specification paragraph 41 except for the allegation that the liability is a joint and several obligation. Because I have concluded that Respondent Employer did not commit any unfair labor practices, I also conclude that Respondent Union bears sole responsibility for the liability summarized in Specification paragraph 41.

Paragraph 42

Specification paragraph 42 alleges that it is appropriate that Respondents be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. The Respondent Union's answer denied this allegation but did not explain the basis for this denial except to restate and reallege its answers to previous allegations.

Because I have concluded that Respondent Employer did not commit any unfair labor practices, I do not conclude that it is appropriate to impose on the Employer the documentation described in Specification paragraph 42. However, I do conclude that it is not only appropriate but necessary that Respondent Union do so.

CONCLUSIONS OF LAW

1. The Respondent Employer, Pacific 2.1 Entertainment Group, Inc., is and was at all material times an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent Union, International Brotherhood of Teamsters, Local 71, is and was at all material times a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, by virtue of Section 9(a) of the Act, Respondent Union has been the exclusive collective-bargaining representative of the following employees of Respondent Employer: All employees engaged in providing transportation services in connection with the production of the television pilot The Novice, including drivers, truck drivers, dispatchers, and captains; excluding all other employees, guards and supervisors as defined in the Act.

4. On about December 3, 2013, Respondent Employer and Respondent Union entered into and maintained an agreement requiring that Respondent Union be the exclusive source of referrals of drivers for employment in the bargaining unit described above in paragraph 3, on Respondent Employer's production of the television pilot, *The Novice*.

5. Respondent Union restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, and thereby violated Section 8(b)(1)(A) of the Act, by the following acts and conduct: Threatening drivers who used the Union's exclusive referral system with removal from the referral list if they failed to become members of the Respondent Union; threatening drivers seeking to use the Respondent Union's exclusive referral system with loss of work if they failed or refused to become members of Respondent Union; threatening drivers seeking to use the Respondent Union's exclusive referral system with transfer from enrollment on an "A List" to a "B List," which afforded fewer opportunities for referral to employment, if they failed to become members of Respondent Union; failing and refusing to refer for employment, through its exclusive referral system, drivers Pam Ray, John Stephens, Joe Cook, John Reynolds, and Jerry Luckey because they were not members of Respondent Union.

6. The Respondent Union caused or attempted to cause an employer to discriminate against an employee in violation of Section 8(a)(3) of the Act, and thereby violated Section 8(b)(2), by failing and refusing to refer for employment, through its exclusive referral system, drivers Pam Ray, John Stephens, Joe Cook, John Reynolds, and Jerry Luckey because they were not members of the Respondent Union.

7. The Respondent Union did not violate the Act in any other way alleged in the Complaint.

8. The Respondent Employer did not violate the Act in any way alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[8]

ORDER

The Respondent Union, International Brotherhood of Teamsters, Local 71, its officers, agents and representatives, shall

[8] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Threatening registrants on its exclusive referral list with removal from the list unless they became union members.

(b) Threatening applicants and potential applicants seeking to use its exclusive referral system with loss of work if they failed or refused to become union members.

(c) Threatening those seeking to use its exclusive referral system with transfer from enrollment on an "A List" to a "B List" which afforded fewer opportunities for referral to employment, if they failed to become union members.

(d) Failing and refusing to refer for employment individuals because they were not union members.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make Pam Ray, John Stephens, Joe Cook, John Reynolds, and Jerry Luckey whole, with interest, for all losses of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in this decision, including by payment of the amounts summarized above under the heading "Paragraph 41," together with interest computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(b) Under the supervision and direction of the Board's designated compliance officer, take all steps necessary to facilitate compliance with federal and state laws requiring the withholding and remittance of FICA and other taxes.

(c) Under the supervision and direction of the Board's designated compliance officer, provide information to the Social Security Administration necessary for the proper allocation of discriminatees' contributions by calendar quarter. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

(d) Within 14 days after service by the Region, post at its office and hiring hall in Charlotte, North Carolina, copies of the attached notice marked "Appendix A."[9] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(e) Within 14 days after service by the Region, mail at its own expense copies of the Notice set forth below as Appendix A, duly signed by Respondent Union's authorized representative, to all individuals who used or sought to use the Respondent Union's hiring hall at any time on or after August 12, 2013, including to all employees in the bargaining unit described in the "Novice Television Pilot Agreement Between Teamsters Local Union 71 and Pacific 2.1 Entertainment Group, Inc."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 10–CA–120024, against Pacific 2.1 Entertainment Group, Inc., is severed and dismissed.

Dated, Washington, DC September 26, 2014

Keltner W. Locke
Administrative Law Judge

APPENDIX A

NOTICE TO MEMBERS AND EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT restrain or coerce you in the exercise of these rights.

WE WILL NOT threaten members or others seeking to use our hiring hall with removal from a referral list if they fail to join or maintain membership in International Brotherhood of Teamsters, Local 71.

WE WILL NOT threaten members or others seeking to use our hiring hall with loss of work if they fail or refuse to join or maintain membership in International Brotherhood of Teamsters, Local 71.

WE WILL NOT threaten members or others seeking to use our hiring hall with transfer from the primary "A" referral list to a secondary "B" referral list if they fail to join or maintain membership in International Brotherhood of Teamsters, Local 71.

WE WILL NOT maintain an exclusive hiring hall referral system that discriminates against applicants for referral to employment on the basis of their nonmembership in the International Brotherhood of Teamsters, Local 71.

WE WILL NOT refuse to permit applicants to use an exclusive hiring hall referral system because they are not members of International Brotherhood of Teamsters, Local 71, or because of any other arbitrary consideration.

WE WILL NOT cause or attempt to cause Pacific 2.1 Entertainment Group, Inc., or any other employer with which we have entered into an agreement establishing an exclusive referral system, to refuse to hire any applicant because of nonmembership in International Brotherhood of Teamsters, Local 71.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their Section 7 rights, set forth above.

WE WILL discontinue use, in our exclusive hiring hall, of a secondary or "B" referral list for nonmembers and will notify all applicants for referral to employment of such removal.

WE WILL revise our exclusive hiring hall rules and procedures so that they do not discriminate against registrants who are not our members, and will notify all members and registrants of the revised policy.

WE WILL make whole, with interest, Pam Ray, John Stephens, Joe Cook, John Reynolds, and Jerry Luckey whole, with interest, for all losses of earnings and other benefits suffered as a result of the discrimination against them.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 71
(Labor Organization)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

233 Peachtree Street N.E., Harris Tower, Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8:00a.m. to 4:30p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CB-114563 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (404) 933-301